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Supreme Court, U.S.
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No. 10-200

In The

Supreme Court of the United States

JOHN E. FITZGIBBONS,

Petitioner,

v.

SALLY J. ZEMAN, TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), (11 U.S.C. 1328(a)(2)) a Chapter 13 Bankruptcy Plan can "cram down" or discharge $354,004.59 in taxes without a separate adversary proceeding to determine dischargeability. [11 U.S.C. 523(a)(1)(C)].

PARTIES TO THE PROCEEDINGS

Petitioner is John E. Fitzgibbons a sole practice bankruptcy practitioner. Respondent is Sally J. Zeman, the Standing Chapter 13 Trustee for the District of Colorado. The Standing Chapter 13 Trustee is not a government employee but is an independent contractor.

John E. Fitzgibbons respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

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LEGISLATIVE HISTORY

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OPINIONS BELOW

The decision of the Court of Appeals is unpublished but may be cited for persuasive value as set out in Fed. R. App. 32.1 and 10th Cir. R. 32.1. It is reproduced at Appendix ("App.") 1-17. The unpublished opinion of the Bankruptcy Appellate Panel for the Tenth Circuit together with the minority opinion is reproduced at App. 18-48. The Bankruptcy Court order is App. 49-71.

STATEMENT OF JURISDICTION

The judgment of a panel of the court of appeals issued on February 11, 2010. App. 1-17. A timely petition for panel rehearing was denied on March 12, 2010. Two days after the petition for panel rehearing was filed it was amended to also request *en banc rehearing*. The petition for *en banc rehearing* was denied as untimely. App. 71. Justice Sotomayor granted an extension of time to include August 9, 2010 to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1 – The Legislative Branch
Section 8 – Powers of Congress

The Congress shall have Power To:

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub. L. 109-8, 119 Stat. 23, effective October 15, 2005) provides:[1]

> *11 U.S.C. § 1328. Discharge*
>
> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –
>
> (1) provided for under section 1322(b)(5) ~~of this title~~;
>
> (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) ~~of this title~~; or (*See* App. 73)

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[1] Underlined language was added by the BAPCPA. ~~Stricken~~ language was deleted by BAPCPA. *See* Skadden Redline of Title 11 U.S. Code from current law as of January 1, 2005. App. 73-92.

11 U.S.C. § 523. Exceptions to Discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or customs duty – . . .

(A) of the kind and for the periods specified in section 507(a)(~~2~~ *3*) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

. . .

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

. . .

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtors' dependents for

(A)(I) an educational benefit overpayment or loan, made, insured or guaranteed by a governmental unit . . . (*See* App. 80)

11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

. . .

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition -

. . .

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1) (C) of this title not assessed before, but assessable, under applicable law or by agreement, after the commencement of the case . . .

Legislative History, United States Code Service, 11 U.S.C. § 523, © 2009 Matthew Bender & Company, Inc.

" . . . Also included are tax payments due under an agreement for deferred payment of taxes, which a debtor had entered into with the Internal Revenue Service (or a State of local tax authority) before the filing of the petition and which relate to a prepetition tax liability [Section 523(a)(1)(D)] are also nondischargeable. This classification applies only to tax claims which would have received priority under Section 507(a) if the taxpayer had filed a title 11 petition on the date on which the deferred payment agreement was entered into. This rule applies only to installment payments which become due during and after commencement of the title 11 case. Payments which had become due within one year before the filing of the petition

receive sixth priority, and will be nondischargeable under the general rule of section 523(a)(1)(A) . . . ".

CASE LAW

In *In re: Dixon* (*Dixon v. US Internal Revenue Service*) (Bankr. D. Kan.), LEXIS 1774, 53 Collier Bankr. Case 2d (MB 373) (2004), a pre BAPCPA case, the Chapter 13 Debtor filed an adversary proceeding to determine dischargeability of taxes. IRS moved to dismiss the adversary proceeding because 11 U.S.C. § 1328 only authorizes the court to grant a discharge upon completion of all plan payments. The court denied the IRS motion ruling a complaint to determine dischargeability can be filed at anytime pursuant to Fed. R. Bankr. P. 4007(b). The same result obtained in *In re: Malin* (*Malin v. US Internal Revenue Service*), 356 B.R. 535 (Bankr. D. Kan.), LEXIS 1629 (2006), a post BAPCPA case. Chapter 13 Debtors filed an adversary proceeding to determine their 2000 taxes would be discharged upon completion of Chapter 13 plan payments. IRS moved to dismiss the adversary proceeding on grounds the court lacked jurisdiction because the Chapter 13 Plan had not yet been confirmed. The court denied IRS' motion, ruling pursuant to Fed. R. Bankr. P. 4007(b) an adversary proceeding can be filed "at anytime" and it was important to determine early on if the taxes were dischargeable so debtors could modify their plan accordingly.

LEARNED TREATISE

"National Conference of Bankruptcy Judges," *The American Bankruptcy Law Journal*, Spring 2005, 79 *Am. Bankr. L.J.* 419, 446 *Taking Exception to Debtor's Discharge, The 2005 Bankruptcy Amendments Make it Easier*

> *VI. CHANGES IN CHAPTER 13 DISCHARGE: THE NEW SUPER-LIGHT DISCHARGE*
>
> *"Perhaps the most sweeping policy change made by the 2005 Act in the discharge arena is seen in Chapter 13. Before BAPCPA, Chapter 13 debtors enjoyed what had been called the 'super' discharge, that is, a more liberal discharge than was available in Chapter 7, designed to encourage a debtor to choose that chapter's debt restructuring and to pay more to creditors rather than opt for a liquidating discharge. If the previous Chapter 13 discharge was 'super' in any sense of being more powerful than discharges under other chapters, that will no longer be true. Instead, under the amendments, debtors will receive what might now be termed the 'super-light' Chapter 13 discharge, one not really 'super' at all. Prior to these amendments, most of 'the long list of exceptions to discharge in 523(a), applicable in Chapter 7, Chapter 12 and individual Chapter 11 cases, is not applicable in Chapter 13 at completion of all payments.' Only the exceptions for alimony or support, student loans and impaired driving offenses were applicable. With the sharp reduction in*

the types of debt that may be discharged in Chapter 13 under the 2005 amendments, and with what appears to be a broader exception from discharge for at least one type of debt, the discharge limitations, coupled with other amendments to Chapter 13, may well contribute to a result opposite from what the means test was intended to do: Debtors who otherwise will qualify for Chapter 7 but who have in the past chosen Chapter 13 may opt for Chapter 7 in larger numbers. . . .

A. New Exceptions to Discharge

The exceptions from the Chapter 13 discharge are reorganized through a rewording of 1328(a)(1) through (4). But more importantly, new exceptions from discharge are added. First, debts 'of the kind specified in section 507(a)(8)(C)' are excluded from the discharge. These are taxes 'required to be collected or withheld and for which the debtor is liable in whatever capacity;' in other words, these are typically trust fund taxes. The House Report indicates that these debts were added to the exceptions from discharge along with the addition of taxes described in 523(a)(1)(B) and (C), in order to prevent a discharge of 'fraudulent taxes.'

Next, the debts described in the following subsections of 523(a) will be excluded from the Chapter 13 discharge: 523(a)(1)(B), taxes for which a return was not filed or timely filed; (1)(C), taxes 'with respect to which the

debtor made a fraudulent return,' or willfully evaded or defeated the tax . . . "

STATEMENT OF THE CASE

On December 4, 2004, debtors entered an Installment Agreement with Internal Revenue Service to pay $141,730.20 plus unquantified interest and penalties for tax periods 1991-1994. They defaulted on this Installment Agreement.

BAPCPA became effective ten months later on October 15, 2005.

In August 2006, Debtors hired Petitioner to file a Chapter 13 Bankruptcy. Among other obligations debtors' owed $354,004.59 in IRS taxes, interest and penalties for 1991-1994. Petitioner filed a Chapter 13 at Case #06-16296 MER (the "administrative case").

There is no case law concerning dischargeability of taxes post BAPCPA. Petitioner studied the learned treatise cited *supra*, pp. 6-8, promulgated by the National Association of Bankruptcy Judges[2] as well

[2] Concerning these learned treatise(s) and case law, the bankruptcy court stated: " . . . (Petitioner) provided the court with certain exhibits (including case law and scholarly articles) upon which he purportedly relied in determining to file the Adversary Proceeding. . . . The Court has reviewed these exhibits and finds none of them *per se* support the filing of an adversary proceeding under circumstances similar to this case. Although the cases and articles have some applicability to this case because they address the dischargeability of taxes in a

(Continued on following page)

as *In re: Dixon* and *In re: Malin*, *supra* p. 5, and BAPCPA amended language in 13 U.S.C. § 1328(a)(2), *supra*, p. 2, which now states on completion of a Chapter 13 Plan, tax debts set out in 11 U.S.C. § 523(a)(1)(C), *supra* p. 3, are no longer discharged. Based on this research, Petitioner determined debtors' $354,004.59 tax obligation would not be discharged upon completion of the Chapter 13 Plan in 2011. Debtors then retained Petitioner to file an Adversary Proceeding to determine dischargeability of taxes. The Adversary Proceeding was filed on November 20, 2006, served on the Internal Revenue Service ("IRS"), IRS filed its Answer, the matter proceeded through disclosures, scheduling, and discovery. Eventually, Petitioner on behalf of Debtors and IRS signed a Stipulation to Dismiss Adversary in which if Debtors paid $14,594.00 through the Chapter 13 Plan, the $354,004.59 in taxes, interest, and penalties

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Chapter 13 context, their relevance under the specific facts of this case is questionable . . . " App. 58-59, Bankruptcy Court Order March 26, 2008.) The Bankruptcy Appellate Panel noted that the bankruptcy court relied on 1.) the Chapter 13 Trustee's "expert testimony" [that the taxes could have been "crammed down" in the Chapter 13 Plan utilizing Sections 1325(a)(5) and 506] Bankruptcy Court Order of March 26, 2008; App. 59, *infra* p. 12, and 2.) the case law and scholarly articles in ruling the Adversary Proceeding to Determine Dischargeability of Taxes was not necessary. App. 33-34, 10th Cir. BAP March 11, 2009 Opinion). The Tenth Circuit stated " . . . The bankruptcy court did not exclude the cited materials, it admitted them and merely found them insufficiently persuasive to conclusively outweigh the other evidence that the court discussed at length in arriving at its decision" (App. 16, 10th Cir., February 11, 2010 Opinion).

would be discharged upon completion of the plan payments. Because of this Court's holding in *Patterson v. Schumate*, 504 U.S. 753 (1992), it was also stipulated IRS' tax lien could extend only to a small part of Debtors' ERISA qualified pension plans because they were not part of the bankruptcy estate. The bankruptcy court approved this stipulation and entered it as an order of court. The Bankruptcy Court Order discharges all the taxes on completion of the plan payments in 2011.

While Adversary Proceeding #06-1906 MER was pending, IRS filed several proofs of claims: #4-1, on October 5, 2006, #5-1 on October 20, 2006, #11-1 on February 12, 2007 (IRS amended its claim to coincide with the Stipulation to Dismiss Adversary 06-1906. Colorado Department of Revenue (CDR) filed claim #6-1 on November 7, 2006 showing unassessed liability with no amount due. A stipulation settling CDR's claim for back taxes was approved by the court on June 8, 2007. The Bankruptcy Court denied Petitioner's motion to hold the case in abeyance pending disposition of the Adversary Proceeding. Each of the amended proofs of claim required Petitioner to prepare, file and "notice out" plan amendments. The 4th Amended Chapter 13 Plan which accounted for the CDR's claim was finally confirmed on July 3, 2007. The confirmed plan approved payment through the plan of $9000 of Petitioner's fees in connection with the adversary proceeding and payment of $14,594 to the Internal Revenue Service for the 1991-1994 taxes.

Petitioner filed a fee application to obtain court approval of a $9,000[3] for Adversary Proceeding attorney fees. The Chapter 13 Trustee objected. At a hearing, the Bankruptcy Court entered the following Order:

> " . . . The Court agrees with the Trustee the time and labor expended in this case are both significant in light of the legal issues presented. While the filing of an adversary proceeding is not precluded under the circumstances, the handling of secured and unsecured taxes through the Chapter 13 confirmation process, absent extenuating circumstances is the most expeditious and economical path to resolving these issues. In addition, as the Trustee noted, the proof of claim filed by the IRS on October 5, 2006, prior to the date (Petitioner) filed the adversary proceeding admitted $288,422.86 of its tax claim was considered by IRS to be on unsecured, general claim, thereby conceding the dischargeability of this amount . . . " (App. 57, Bk. Court Order 3.26.08).

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[3] The Bankruptcy Court noted " . . . (Petitioner) has received $4,750.00 to date and . . . is requesting an additional $9,000.00 to be paid through the Debtor's plan. Therefore, it appears (petitioner) is waiving a portion of his fees in the approximate amount of $5,615.02." Bkrtcy. Court Order, March 28, 2008, App. 56. The Bankruptcy Court ruled $4,750.00 attorney fees for the administrative case is reasonable; but all fees for the adversary proceeding were disallowed because the adversary proceeding was unnecessary. Bankruptcy Court Order, March 28, 2006. App. 70.

. . .

> " . . . Therefore, the Court agrees with the (Chapter 13) Trustees' argument and finds, although BAPCPA has placed additional burdens on debtors and their counsel, nothing in BAPCPA precluded (Petitioner) from implementing the provisions of Sections 1325(a)(5) and 506 and providing for the IRS' tax liability through the Debtors' Chapter 13 plan rather than using the more costly and time-consuming route of filing the Adversary Proceeding. Accordingly, the Court finds although this case involved substantial tax liability, the novelty or difficulty of the case was not unusual compared to other Chapter 13 cases coming before the Court. (App. 59, Bk. Court Order 3.26.08) . . . "

Appeal No. 08-058 to the Tenth Circuit Bankruptcy Appellate Panel followed. The issue was whether after debtors' paid all payments through their five year Chapter 13 Plan, would the "new superlight discharge" of BAPCPA leave them with an undischarged tax liability? In other words, after the case was closed, absent an adversary proceeding ruling that the 1991-1994 taxes are discharged, could IRS then assert under 11 U.S.C. § 523(a)(1)(C) that these debtors " . . . made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . "?

The BAP first noted " . . . Trustee testified . . . that most, if not all, experienced Chapter 13 practitioners would have employed the "cram down

process" to value the IRS's secured claim, rather than filing the adversary proceeding to determine dischargeability (of taxes) . . . " (App. 26, BAP Opinion March 11, 2009) The BAP then agreed with the Bankruptcy Court's conclusion that filing the Adversary Proceeding was "unnecessary" (and that the same result could have been achieved through the Chapter 13 Plan). (App. 37, BAP March 11, 2009 Opinion)

The concurring BAP Judge concluded " . . . the bankruptcy court's conclusions that the adversary proceeding was unnecessary, and that the Debtors could have obtained the same relief through the confirmation process is a mixed question of law and fact . . . " (App. 46) and " . . . Because unsecured federal income taxes can be excepted from a Chapter 13 discharge (App. 46-47) in certain instances under Section 1328(a), [Section 1328(a) excepts from discharge taxes 'of the kind specified in Section 507(a)(8)(C) or in paragraph (1)(B) [and] (1)(C) . . . of section 523(a)." 11 U.S.C. § 1328(a)(2). These include taxes assessed upon a late return that was filed within the two year period prior to the bankruptcy petition, and taxes assessed after the debtor "made a fraudulent return of willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(B) and (C). App. 47, fn. 7] the fact that IRS conceded the bulk of its claim was unsecured was not necessarily dispositive of dischargeability. App. 47. [A claimant is not required to, and generally does not indicate in its proof of claim whether it believes its claim is dischargeable. Moreover, in the case of taxes and

penalties, the claimant does not need to file an adversary to have its claim declared non-dischargeable, as Section 523(a)(1) is self executing. Thus, a debtor who is uncertain whether taxes and penalties will be discharged, or desires to confirm that the taxes will be discharged upon completion of a Chapter 13 Plan, may indeed desire to obtain a binding determination of dischargeability through an adversary proceeding. It appears that in the Stipulation to Dismiss filed in the adversary proceeding, the Debtors may have benefitted from a stipulation that "1991 through 1994, inclusive, taxes are discharged upon completion of Chapter 13 plan payments." . . .] (App. 47, fn. 8, BAP March 11, 2009 concurring opinion)

The Tenth Circuit opines " . . . The thrust of the Trustee's testimony and the bankruptcy court's conclusion about the adversary proceeding being ill-advised was an experienced Chapter 13 practitioner would have communicated effectively and efficiently with the IRS to work out an agreement about this sort of complication (i.e., the effect of *Patterson v. Schumate,* 504 U.S. 753 (1992) during the plan confirmation process, making ancillary adversary proceedings unnecessary . . . " (App. 13, 10th Cir. Opinion and Order, February 11, 2010) and Petitioner had not "demonstrated" it was necessary to bring an adversary proceeding in order to reach a satisfactory agreement with IRS concerning debtors' retirement plans, App. 13, and since the statutory language of 11 U.S.C. § 507(a)(8)(A)(iii) and legislative history, (*supra* 4-5), was not part of the BAPCPA of 2005, Petitioner

had made no argument to explain his " . . . concern about the potential nondischargeability . . . " (of Debtor's default on the December 4, 2004 Installment Agreement for the 1991-1994 taxes.) (App. 13, 10th Cir. Opinion and Order, February 11, 2010), that " . . . there is nothing to suggest that the (adversary) agreement reached with the IRS could not have been worked out effectively and efficiently in the course of the confirmation proceeding . . . " (App. 13-14, 10th Cir. Opinion and Order, February 11, 2010); and that the contention that " . . . the BAPCPA amendment to 11 U.S.C. § 1325(a), adding the so called 'hanging paragraph' to exempt some creditors from the 'cram down' rule . . . has not established that the resolution of the legal issue . . . here required resort to an adversary proceeding . . . " (App. 14-15, 10th Cir. Opinion and Order, February 11, 2010)

REASONS FOR GRANTING THE WRIT

A Chapter 13 Plan generally must be for a period of five years 11 U.S.C. § 1325(b)(4)(A)(ii). At the conclusion of the five year period, if all plan payments have been made, 11 U.S.C. § 1328(a), authorizes a bankruptcy court to discharge only certain debts. Other debts are excepted from discharge. For example, BAPCPA amended 11 U.S.C. § 1328(a) to add 11 U.S.C. § 523(a)(1)(C), excepting from discharge taxes " . . . with respect to which debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . " After BAPCPA such

taxes are no longer discharged upon completion of plan payments. The National Conference of Bankruptcy Judge's noted, *supra* pp. 6-8, the post BAPCPA Chapter 13 discharge is a "super light discharge" when it comes to 11 U.S.C. § 523(a)(1)(C) taxes. Also excepted from discharge are government insured student loans 11 U.S.C. § 523(a)(8) " . . . unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtors' dependents . . . ". Once the bankruptcy court issues the discharge after all plan payments have been made, the bankruptcy court loses jurisdiction.

I. The Tenth Circuit Court of Appeals has decided taxpayers can discharge taxes which may be fraudulent or a willful attempt to evade or defeat taxes in a Chapter 13 Plan without an adversary proceeding. This is an important question of federal law not settled by the Supreme Court but which should be

If an experienced Chapter 13 bankruptcy attorney relies on the Tenth Circuit's ruling in this case, all that is necessary to discharge such taxes is to " . . . communicat(ed) effectively and efficiently with the IRS to work out an agreement . . . during the plan confirmation process . . . *supra* p. 14." Presumably, language would be inserted into the Chapter 13 Plan saying the debtors' 1991-1994 taxes were "not fraudulent nor a willful attempt to evade or defeat the taxes . . . "; the Chapter 13 Plan would be served

on IRS, if IRS filed no objection, the Bankruptcy Court would confirm the plan. Taxpayers may struggle for five years paying off their Chapter 13 Plans, only to discover IRS (and state tax authorities) asserting taxes not paid through the plan are collectible with interest and penalties because the bankruptcy court had no authority to discharge taxes through a Chapter 13 Plan.

The bankruptcy court and the Tenth Circuit Bankruptcy Appellate Panel determined the most cost effective way to handle the discharge of these taxes (11 U.S.C. § 523(a)(1)(C)) is the "cram down process" of Chapter 13, i.e. (11 U.S.C. § 1325(a)(5) and 506(a)). 11 U.S.C. § 506(a) specifies that "a claim secured by a lien on property in which the (bankruptcy) estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim . . . "

The Supreme Court describes the "cram down"[4] option, as follows: " . . . Under the 'cram down' option,

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[4] Since BAPCPA, the "hanging paragraph" prevents the valuation and "cram down" of certain claims under 11 U.S.C. § 506(a). *In re: Ballard*, 526 F.3d 634, 2008 U.S. App. LEXIS 10672 (10th Cir. 2008). Thus, an attorney who purports to "cram down" such a claim, and who does not know about the "hanging paragraph" of BAPCPA will leave his/her client with an undischarged debt at the conclusion of plan payments. A similar result may ensue when an attorney "crams down" taxes.

the debtor is permitted to keep the property over the objection of the creditor; the creditor retains the lien securing the claim, see: 11 U.S.C. § 1325(a)(5)(B)(I), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the . . . collateral . . . The value of the collateral is governed by 11 U.S.C. § 506(a) . . . " *Associates Commer. Corp. v. Rash*, 520 U.S. 953, 957, 117 S.Ct. 1879, 138 L. Ed. 2d 148 (1997).

As the Bankruptcy Court noted, *supra* p. 11 IRS " . . . admitted $288,422.86 of its $354,004.59 tax claim was a unsecured, general claim . . . " App. 57. Since IRS had only a general, unsecured claim as to $288,422.86, there was no lien to "cram down." The balance of its $354,004.59 claim was secured by debtors' ERISA qualified pension plans. However, *Patterson v. Schumate*, 504 U.S. 753 (1992), holds the ERISA qualified pension plans are not part of the bankruptcy estate. Therefore, although IRS had a tax lien over these pension plans, the bankruptcy court lacked jurisdiction to "cram down" the lien.

II. The Tenth Circuit Court of Appeals has decided taxing authorities are not entitled to due process of an adversary proceeding. This conflicts with Federal Rules of Bankruptcy Procedure Rule 7001(6) and this Court's holding in *Tennessee Student Loan Assistance Corp. v. Hood*, 541 U.S. 440, 449-452

The Bankruptcy Rules state an adversary proceeding is the exclusive procedure for determining the discharge of a debt in bankruptcy court. Fed. R. Bankr. P. 7001(6). See: *Tennessee Student Loan Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004). In *In re: Mersman v. Educational Credit Corp.*, 505 F.3d 1033 (10th Cir. 2007), the Tenth Circuit reversed a long standing "discharge by declaration" procedure discharging student loans in a Chapter 13 Plan without an adversary proceeding. In *Mersman*, the Tenth Circuit held "discharge by declaration" of student loans violated the government's procedural due process rights guaranteed in an adversary proceeding. Fed. R. Bankr. P. 7001. In this case, the Tenth Circuit has decided tax returns which may be fraudulent or a willful attempt to evade or defeat taxes can be discharged through a Chapter 13 Plan without adversary proceeding due process being afforded to IRS (or state tax authorities).

CONCLUSION

Taxpayers need to know if a Chapter 13 Plan can "discharge by declaration" or "cram down" taxes or if an adversary proceeding is required. The Tenth Circuit has decided such taxes can be "discharged by declaration" (or crammed down) in a Chapter 13 Plan without an adversary proceeding. This is an important question of federal law not yet settled by the Supreme Court but should be. In addition, the Tenth Circuit has decided an adversary proceeding is not necessary to determine dischargeability of taxes. This is contrary to Fed. R. Bankr. P. 7001(6) and this court's decision in *Tennessee Student Loan Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004). It is important this matter be resolved while a bankruptcy court retains jurisdiction during the five year plan, so a debtor can file an adversary proceeding, if necessary to determine the dischargeability of taxes. For these reasons, Petitioner requests this Court issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: WILLIS RAY MATNEY; PAMELA KAY MATNEY, Debtors.	
JOHN E. FITZGIBBONS, Appellant, v. SALLY J. ZEMAN, Trustee, Appellee.	No. 09-1170 (No. CO-08-058) (BAP)

ORDER AND JUDGMENT*

(Filed Feb. 11, 2010)

Before **GORSUCH** and **ANDERSON**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appellant John E. Fitzgibbons served as legal counsel for debtors in the underlying bankruptcy proceeding. After the bankruptcy court confirmed debtors' Chapter 13 Plan, Mr. Fitzgibbons submitted an application seeking $13,750 in legal fees, though he claimed to have earned over $19,000. The Standing Chapter 13 Trustee objected to the application on numerous grounds. Following a hearing, the bankruptcy court determined that Mr. Fitzgibbons' fee should be limited to the $4,750 he had already received for his legal services from debtors. The Tenth Circuit Bankruptcy Appellate Panel (BAP) affirmed in an unpublished decision, and later denied Mr. Fitzgibbons' motion for rehearing. Mr. Fitzgibbons now appeals from the BAP's initial merits decision.[1] We exercise jurisdiction under 28 U.S.C. § 158(d) and affirm.

Standard of Review

Although the case reaches us by way of the BAP, we independently review the bankruptcy court's decision. *Daimler Chrysler Fin. Servs. Ams. L.L.C. v. Ballard (In re Ballard)*, 526 F.3d 634, 636 (10th Cir.

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[1] Mr. Fitzgibbons filed his notice of appeal from the BAP's initial decision while his motion for rehearing was pending. That notice became effective for purposes of appealing the initial decision upon the denial of rehearing. *See* Fed. R. App. P. 6(b)(2)(A)(i). Mr. Fitzgibbons did not, however, amend the notice after the denial of rehearing to include that later order in this appeal. *See* Fed. R. App. P. 6(b)(2)(A)(ii).

2008). Absent an abuse of discretion, we will not disturb its decision to award a reduced fee. *See Rubner & Kunter P.C. v. U.S. Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321, 1322 (10th Cir. 1993). Of course, such an award may turn on specific legal premises or factual findings, and in that event "we review de novo any statutory interpretation or other legal analysis underlying the [fee] decision and review for clear error any supporting findings of fact." *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 537 F.3d 1165, 1183 (10th Cir. 2008) (quotation omitted). *See In re Ballard*, 526 F.3d at 636 (noting usual de novo and clear error standards apply to circuit review of bankruptcy court decisions). Mr. Fitzgibbons also challenges an evidentiary ruling at the fee hearing, involving the admission of expert opinion testimony from a witness not previously disclosed as an expert. We review that particular objection also for an abuse of discretion. *See United States v. Charley*, 189 F.3d 1251, 1261-62 (10th Cir. 1999).

Summary of Proceedings

The decisions issued by the bankruptcy court and the BAP discussed the factual and procedural background at length, and that discussion need not be repeated in full here. But we do set out those matters relevant to our disposition of the issues raised in this appeal.

A. Fee Hearing

At the fee hearing, Mr. Fitzgibbons testified in favor of his application and the Trustee testified against it. As the bankruptcy court noted, the fee sought was well in excess of the presumptive fee of $1,800 for Chapter 13 proceedings (increased to $3000 for more recent applications). The bulk of the excess was attributed to an adversary proceeding Mr. Fitzgibbons had pursued alongside the usual plan confirmation process. His justification for doing so was that it was essential to establish how much of his clients' large tax debt (nearly $350,000) was secured by an existing lien and how the remainder would be treated as to dischargeability. He insisted that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. No. 109-8, 119 Stat. 23, interjected substantial uncertainty into dischargeability issues.

The adversary proceeding was resolved by a stipulation providing in pertinent part that (1) the Internal Revenue Service (IRS) had properly perfected its lien, which secured $14,594 of the tax debt in the bankruptcy; (2) the IRS was also secured, outside of bankruptcy, in debtors' retirement plans, valued (at about $59,000) as of the date of the petition; (3) the latter amount could be accounted for either as a secured claim in debtors' Chapter 13 Plan or by retaining the IRS lien on the retirement plans; and (4) debtors' tax debt would be discharged upon completion of Chapter 13 Plan payments. Aplt. App. at 180-82. Mr. Fitzgibbons repeatedly stressed the

value of this stipulation, which gave his clients the assurance that if they complied with the stipulation and their associated Chapter 13 Plan, their tax liabilities would be put behind them. He concluded his case at the hearing by saying "I think that certainty is worth the [additional $9000] that I'm asking for." *Id.* at 316.

The Trustee expressed a very different view of the adversary proceeding, seeing it as unnecessary. Most practitioners, she said, would just work through such issues with the IRS, far more efficiently, in the ordinary course of the confirmation process. And, as for the confirmation process here, she pointed out numerous instances in which inaction or delay by Mr. Fitzgibbons had unduly prolonged the proceedings and required multiple amendments to the Chapter 13 Plan. She also indicated that his fee application included time for researching areas that a bankruptcy practitioner should have known or learned as a matter of professional responsibility. But she did not in her direct testimony give an expert opinion regarding fees. When counsel for the Trustee began to ask for her opinion, Mr. Fitzgibbons objected on the basis that she had not been disclosed as an expert witness, and the bankruptcy court promptly sustained the objection.

During cross-examination, however, Mr. Fitzgibbons repeatedly asked the Trustee to opine on matters relating to the substance of his legal representation and the reasonableness of his fee request. After eliciting a particular unfavorable opinion, he

began inquiring into the Trustee's professional qualifications for expressing the opinion, to which counsel for the Trustee objected. At that point, the bankruptcy court held that Mr. Fitzgibbons had already opened the door to expert opinion testimony from the Trustee, so either side could pursue relevant inquiries in that regard. On redirect, counsel for the Trustee obtained expert opinions on the following material points: (1) filing five Chapter 13 Plans before getting one confirmed in this case was unreasonable; with adequate factual research and effective communication by Mr. Fitzgibbons, no more than two should have been necessary; (2) it was unreasonable to pursue the adversary proceeding in addition to the confirmation process; and (3) taking into account the *Johnson* factors governing fee awards,[2] a fee in the neighborhood of $4,600 would be reasonable.

B. Bankruptcy Court's Fee Order

The bankruptcy court issued a thorough decision. First, it examined all of the governing factors in light of the record. While the testimony of the Trustee was important, the court did not simply adopt her

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[2] The factors set out in the seminal case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), are applicable to attorney fee determinations in bankruptcy cases under 11 U.S.C. § 330. *See Houlihan Lokey Howard & Zukin Capital v. Unsecured Creditors' Liquidating Trust (In re Commercial Fin. Servs., Inc.)*, 427 F.3d 804, 811 (10th Cir. 2005).

conclusions. Rather, the court considered her testimony along with the rest of the record, noting where and why it agreed with particular points she had made. *See* Bankruptcy Court Order[3] at 4-8. Indeed, the court concluded its analysis of the fee factors by stating that "*[b]ased on the Court's experience* in reviewing fee applications, this case falls much closer to the lower [i.e., $1,800] range of fees it has awarded." *Id.* at 8 (emphasis added).

The bankruptcy court then considered several of the broader objections the Trustee had raised in opposition to the fee application. The court agreed with several criticisms of the timeliness and competence of counsel's prosecution of the bankruptcy case. *Id.* The court also found that "the detail and description of the legal services set forth [in the fee application] to be woefully inadequate . . . to determine whether the amount of time for such legal services was reasonable," noting that "[t]he lack of information provides additional support for not allowing all requested fees." *Id.* at 9. Finally, and "most troubling to the Court," *id.*, was Mr. Fitzgibbons' noncompliance with fee disclosure requirements. The court's explanation of why – consistent with a list of cited cases – this omission is in itself "more than sufficient to deny some or all of his requested fees in this case," *id.* at 10, is worth quoting:

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[3] The bankruptcy court's unpublished fee order is included as Attachment 1 to Appellant's Opening Brief.

> [T]he Court understands Mr. Fitzgibbons to have received $2,250 at or around the time the Debtors' case was filed. This information was not provided until approximately fourteen months after the case was filed. However, at some other time during the case, unbeknownst to the Trustee, creditors, or the Court, the Debtors must have paid Fitzgibbons an additional $2,500, based on his Fee Application, which states Fitzgibbons has been paid $4,750 to date. This presents a host of questions, not the least of which is the question of how the Debtors obtained additional funds to pay Fitzgibbons while they were presumably committing all of their disposable income to their Chapter 13 plan. This illustrates the reason for the fee disclosure requirement under [11 U.S.C.] § 329 and Fed. R. Bankr. P. 2016(b), to ensure the Court can carry out its obligation to scrutinize compensation of debtor's attorneys and thereby protect creditors.

Id.

Having concluded, "[b]ased on its review of the *Johnson* factors and the Trustee's Objection to the Fee Application," that "the requested legal fees are not reasonable under the circumstances of this case," *id.*, the bankruptcy court came to the ultimate question of what fee, if any, to allow. At this point, the court recited that "the Trustee was endorsed as an expert witness in Chapter 13 fee matters and indicated she believed a reasonable fee in this case would be approximately $4,600." *Id.* The court essentially

adopted that figure, though it concluded that ordering disgorgement of the additional $150 that debtors had already paid Mr. Fitzgibbons was not appropriate. *Id.* It therefore awarded Mr. Fitzgibbons the $4,750 for his legal services in the case. *Id.*

C. Appeal to the BAP

Mr. Fitzgibbons raised two issues in his appeal to the BAP:

> 1. Whether the [bankruptcy] court erred in allowing expert testimony which had not been disclosed as required by Fed. R. Civ. P. 26(a)(2).
>
> 2. Whether in the wake of the "new super light (chapter 13) discharge" enacted by [BAPCPA] the [bankruptcy] court erred in refusing to award attorney fees in conjunction with Adversary Proceeding 09-01906 MER in which [the IRS] stipulated the bulk of debtors' $354, 004.49 in federal taxes would be discharged upon payment of $14,594.00 through the Chapter 13 Plan.

Aplt. App. at 5.

The BAP held that the bankruptcy court had not abused its discretion in allowing the Trustee's expert testimony, for several reasons. The substance of her testimony clearly fell within the parameters of her pretrial disclosure as a lay witness (concerning Mr. Fitzgibbons' legal representation, the reasonableness of his requested fee, and representation by other

attorneys in similar cases), and the bankruptcy court did not err in finding that Mr. Fitzgibbons had waived his right to object to her use as an expert on such matters by his own questioning on cross-examination. BAP Opinion[4] at 11-12. The BAP also noted that the bankruptcy court did not rely solely on the Trustee's testimony in resolving the fee application; indeed, that much of what the Trustee had touched on was also within the expertise of the bankruptcy court itself. *Id.* at 12.

The BAP addressed the second issue raised by Mr. Fitzgibbons, regarding the disallowance of fees for the adversary proceeding, somewhat less directly, as encompassed within the overall determination of reasonableness. As to that determination, the BAP recounted the bankruptcy court's analysis of the *Johnson* factors and the Trustees objections and concluded that the bankruptcy court "1) used the appropriate factors to examine and evaluate the Fee Application; 2) conducted a thorough analysis of all of the bases for Trustee's objection; 3) did not make any findings of fact that the record on appeal demonstrates were clearly erroneous; and 4) issued a well-supported and well-reasoned decision." *Id.* at 17.

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[4] The BAP's unpublished opinion is included as Attachment 3 to Appellant's Opening Brief.

Issues Raised on this Appeal

Mr. Fitzgibbons has framed his issues on this appeal in terms that differ considerably from those used in his appeal to the BAP. Indeed, his challenge to the Trustee's expert testimony for lack of pretrial disclosure is not even alluded to in his formal Statement of Issues, *see* Aplt. Opening Br. at 2, and there are only passing references to the bankruptcy court's finding of waiver on that point in the argument section where a very different challenge to her testimony is pursued, *see id.* at 25, 26. It appears the non-disclosure objection, as a distinct challenge to the admission of the Trustee's expert testimony, has been abandoned. In any event, for the reasons explained by the bankruptcy court and the BAP, we would not find any abuse of discretion by the bankruptcy court in this regard.

The two issues Mr. Fitzgibbons has designated for our review are:

> Whether the bankruptcy court and BAP opinions should be reversed and reviewed *de novo* because the "legal underpinnings" show these courts relied on the Trustee's opinion that filing an adversary proceeding was unnecessary because the "cram down" provisions of 11 USCA 1325(a)(5) and 506 should be utilized and that an installment agreement was cancelled even though the Trustee stated she had not studied Chapter 13 tax dischargeability issues of BAPCPA.

> Whether the bankruptcy court and BAP should be reversed for abuse of discretion in failing to act as the *Daubert* gatekeeper and in failing to consider National Association of Bankruptcy Judges, American Bankruptcy Law scholarly articles and cases concerning the new "superlight" Ch 13 bankruptcy discharge[.]

Aplt. Opening Br. at 2. Most aspects of these arguments can be traced to points at least arguably preserved in Mr. Fitzgibbons' appeal to the BAP, but we stress that assignments of error are not subject to substantive alteration from one appellate level to the next. Wholesale reformulations of the sort evident here risk adverse procedural consequences for the appellant who may omit preserved issues and substitute unpreserved issues in the process.

Most of Mr. Fitzgibbons' briefing challenges, on various legal bases, the bankruptcy court's conclusion that the adversary proceeding was unnecessary in light of what could be done in connection with the Plan confirmation process. The first of these assertedly erroneous "legal underpinnings" of the court's conclusion relates to debtors' retirement plans. Mr. Fitzgibbons argues that these plans fell outside the bankruptcy estate under *Patterson v. Shumate*, 504 U.S. 753 (1992), and hence the rights of the IRS in these significant assets would not be resolved by the Chapter 13 Plan. But he does not explain how an adversary proceeding in the bankruptcy case would have resolved the parties' interests in this

non-bankruptcy property. In any event, this whole line of argument misses the basic point here. The thrust of the Trustee's testimony and the bankruptcy court's conclusion about the adversary proceeding being ill-advised was that an experienced Chapter 13 practitioner would have communicated effectively and efficiently with the IRS to work out an agreement about this sort of complication during the Plan confirmation process, making ancillary adversarial proceedings unnecessary. The fact that the Plan itself would not directly address the matter does not nullify this point. Mr. Fitzgibbons has not demonstrated why it was necessary to bring an adversary proceeding in order to reach a satisfactory agreement with the IRS regarding debtors' retirement plans.

Mr. Fitzgibbons also notes that debtors had entered into an agreement with the IRS to make monthly installment payments of $1,000 on their tax liability, and he insists that the need for clarification of the consequences, particularly under BAPCPA, of their default on this agreement prior to filing for bankruptcy warranted pursuit of the adversary proceeding. He cites legislative statements that, he says, show BAPCPA added provisions to 11 U.S.C § 523 to preclude discharge of tax-settlement installment obligations due within one year before the bankruptcy filing. Actually, the legislative history he quotes from in his brief and provides in his appendix, Aplt. App. at 75-79, is not for BAPCPA. It comes from the House

and Senate Reports for the *Bankruptcy Reform Act of 1978*.[5] And aside from this patently inapposite legislative history (Congress has amended § 523 at least ten times since 1978), Mr. Fitzgibbons offers no argument based on current statutory language to explain his concern about the potential non-dischargeability of debtors' obligations under the tax settlement agreement. In any event, we come back to the same point made above in connection with debtors' retirement plans: Mr. Fitzgibbons has not shown that his pursuit of the adversary proceeding was a necessary response to the potential issue he perceived; there is nothing to suggest that the agreement reached with the IRS could not have been worked out effectively and efficiently in the course of the confirmation process.

Mr. Fitzgibbons also seems to contend that the BAPCPA amendment to 11 U.S.C. § 1325(a), adding the so-called "hanging paragraph" to exempt some creditors from the "cram down" rule,[6] may have made some of debtors' unpaid installment obligations to the IRS non-dischargeable, justifying his resort to the

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[5] See H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 5963, 6320-21, 6499-6500; S. Rep. 95-989, 1978 U.S.C.C.A.N. 5787, 5863-66.

[6] Briefly put, the "cram down" rule, based on the operation of § 1325(a)(5) and 11 U.S.C. § 506, bifurcates a secured claim into a secured component limited to the current value of the collateral and an unsecured claim for the remainder. *See In re Ballard*, 526 F.3d at 637-38 (discussing cram down and BAPCPA's amendment adding "hanging" paragraph at end of § 1325(a)).

adversarial proceeding to resolve the issue. The relevant change here applies to debts "incurred during the 1-year period preceding" bankruptcy. *Id.* But the unpaid tax liability owed by debtors arose many years before bankruptcy; IRS installment agreements are merely one authorized means of collecting an existing tax debt. *See* 26 U.S.C. § 6159. And, in any event, as we have noted repeatedly in other respects, Mr. Fitzgibbons has not established that resolution of the legal issue he perceives here required resort to an adversary hearing.

We note that in connection with his references to cram down and § 1325(a), Mr. Fitzgibbons also advances an additional objection to the allowance of expert testimony from the Trustee. He contends her responses to his questions about her study of BAPCPA with regard to dischargeability and cram down demonstrated that she was not qualified to opine on the matter. Mr. Fitzgibbons never raised this (or any other) substantive objection to the Trustee's qualification to provide expert testimony, and we would not disturb the decision under review on the basis of this untimely objection. But we do not wish to suggest there was a problem with the Trustee's expert testimony. She was qualified as an expert through questioning by Trustee's counsel, and the testimony Mr. Fitzgibbons cites as admitting some gap in her knowledge regarding dischargeability and cram down after BAPCPA does not support his claim. In response to his inquiry regarding the amount of time she had spent studying BAPCPA and dischargeability issues,

the Trustee said, "A lot of time. Not on the one issue of tax dischargeability, but a lot of time on the new law." Aplt. App. at 295. Mr. Fitzgibbons' strained effort to read this statement as disclaiming any study of BAPCPA's effect on dischargeability issues is utterly unpersuasive.

Mr. Fitzgibbons also contends the bankruptcy court abused its discretion by holding that some legal materials he had submitted discussing changes BAPCPA made in the area of dischargeability did not "'*per se*, support the filing of an adversary proceeding under circumstances similar to this case.'" Aplt. Opening Br. at 26 (quoting Bankruptcy Court Order at 6). But he offers no particularized argument in this regard, such as specific legal points substantiated in the materials that *would* per se support his filing of the adversary proceeding. Rather, he makes a legally inapposite objection under the rules governing admission and exclusion of evidence on grounds of relevance and prejudice. The bankruptcy court did not exclude the cited materials; it admitted them and merely found them insufficiently persuasive to conclusively outweigh the other evidence the court discussed at length in its decision.

Finally, it is important to acknowledge the importance the bankruptcy court rightly placed on Mr. Fitzgibbons' noncompliance with fee disclosure obligations. While it is not clear whether the court intended this misfeasance to serve – as it may have – as a fully distinct alternative rationale for limiting Mr. Fitztgibbons' fee to what he had already been paid, it

certainly augments the other justifications the court expressed for its fee reduction that we have considered above.

The judgment of the BAP affirming the order of the Bankruptcy Court is AFFIRMED.

Entered for the Court

Wade Brorby
Senior Circuit Judge

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE WILLIS RAY MATNEY and PAMELA KAY MATNEY, Debtors. JOHN E. FITZGIBBONS, Appellant, v. SALLY ZEMAN, Trustee, Appellee.	BAP No. CO-08-058 Bankr. No. 06-16296-MER Chapter 13 OPINION* (March 11, 2009)

Appeal from the United States Bankruptcy Court for the District of Colorado

Before CORNISH, Chief Judge, MICHAEL, and RASURE, Bankruptcy Judges.[1]

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

MICHAEL, Bankruptcy Judge.

Willis and Pamela Matney ("Debtors") hired John E. Fitzgibbons ("Attorney") to represent them in this somewhat routine Chapter 13 case. The only potentially complicating factor was a significant amount of past due taxes, penalties, and interest that Debtors owed the Internal Revenue Service ("IRS").[2] As it turned out, the case was not particularly complex. Ultimately, Attorney sought the bankruptcy court's approval of $13,750 in total compensation. After conducting an evidentiary hearing, the bankruptcy court allowed $4,750. Attorney brings this appeal. After review of the sparse record on appeal and applicable law, we affirm the fee award.

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[2] The total debt owed to the IRS was in excess of $350,000. The taxes related to tax years 1991-1994. *See Chapter 13 Fee Application* at ¶ 2, *in* Appellant's Corrected Appendix ("Appellant's App.") at 31.

I. FACTUAL BACKGROUNDS[3]

Attorney filed Debtors' Chapter 13 petition on September 12, 2006. Debtors paid him a "basic services flat fee" of $2,250 in advance.[4] As a result, Attorney should have filed a fee disclosure statement within 15 days of filing the petition, as required by 11 U.S.C. § 329, and Federal Rule of Bankruptcy

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[3] Pursuant to Federal Rule of Bankruptcy Procedure 8009(b) and 10th Circuit BAP Local Rules 8006-1(a) & 8009-1(b), as appellant, Attorney is required to bring all documents necessary for appellate review before this Court in an appendix to his brief (hereafter "record on appeal"). As recently explained by the Tenth Circuit Court of Appeals, we, like other courts, colloquially refer to the appendix as the record on appeal, but technically it is not. *Milligan-Hitt v. Bd. of Trs. of Sheridan Court Sch. Dist. No. 2*, 523 F.3d 1219, 1231 (10th Cir. 2008). However, as also explained by the Tenth Circuit, it is well established that "we have no obligation to go further and examine documents that should have been included . . . in the appendix," *id.*, and "[a]n appellant who provides an inadequate record does so at his peril." *Burnett v. Sw. Bell Tel., L.P.*, No. 07-3126, at *1, 2009 WL 237702 (10th Cir. Feb. 3, 2009) (internal quotation marks omitted). In this case, we specifically decline to go beyond the appendix provided by Attorney. Because the majority of the necessary documents have not been included, the following recitation of the facts has been extrapolated from what little record Attorney has provided, and from the bankruptcy court's findings of fact in its Order on Fee Application.

[4] *Chapter 13 Fee Application & Exhibit E* thereto, *in* Appellant's App. at 30, 40. Debtors paid Attorney a total of $2,524 prior to filing, which included the Chapter 13 filing fee. "Basic services" are those described in Exhibit A to Second Amended General Procedure Order 2001-1 of the United States Bankruptcy Court for the District of Colorado. The Second Amended General Procedure Order requires that these basic services be provided in a timely and competent manner.

Procedure 2016(b) ("Fee Disclosure Statement").[5] Instead, Attorney waited over ***14 months*** to file the Fee Disclosure Statement.[6]

The initial petition was a "bare bones" petition, and did not include the necessary Statement of Financial Affairs, Statement of Current Monthly Income, Employee Income Records, Proposed Chapter 13 Plan, and Schedules G, H, I & J.[7] Accordingly, the bankruptcy court issued a Notice of Deficiency on September 13, 2006, requiring the omitted information to be provided by September 28, 2006.[8] None of the omitted information was filed until October 11, 2006.[9] The initial proposed Chapter 13 plan was not filed until November 3, 2006,[10] 52 days after the petition was filed.[11]

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[5] Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code, and all future references to a rule are to the Federal Rules of Bankruptcy Procedure.

[6] The Fee Disclosure Statement was not filed until December 14, 2007. *See Order on Fee Application* at 10, *in* Appellant's App. at 55.

[7] *Id.* at 1, *in* Appellant's App. at 46.

[8] *See Docket No. 5, in* Appellant's App. at 20.

[9] *See Docket Nos. 9-13, in* Appellant's App. at 19.

[10] *See Docket No. 23, in* Appellant's App. at 18.

[11] Even after the initial Chapter 13 plan was filed, basic petition information continued to have to be amended. For example, one of the Debtor's social security numbers was corrected on December 4, 2006, and an amended Form 22C was

(Continued on following page)

The main dispute in this case centered around the tax claim filed by the United States of America, acting through the IRS. The record on appeal does not contain the IRS's proofs of claim.[12] However, at trial, the parties requested that the bankruptcy court take judicial notice of the claims register in this case, and it did so.[13] According to the bankruptcy court, in a proof of claim filed October 5, 2006, the IRS admitted that it considered approximately 80 per cent of its claim to be a general unsecured (and thus dischargeable) claim.[14] Attorney concluded it was necessary to file an adversary proceeding to determine the dischargeability of the IRS debt. On October 25, 2006, Debtors paid Attorney a retainer of $2,500 in connection with the adversary proceeding.[15] Again, Attorney failed to file the required Fee Disclosure Statement.

On November 20, 2006, Attorney filed an adversary complaint against the IRS, asserting both

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filed December 11, 2006. *See Docket Nos. 34 & 38, in* Appellant's App. at 16.

[12] It appears that an original proof of claim was filed on October 5, 2006, and then subsequently amended on October 20, 2006, and February 12, 2007. *See* Appellant's Opening Br. at 5.

[13] *Order on Fee Application* at 5 n.8, *in* Appellant's App. at 50.

[14] *Id.* at 5, in Appellant's App. at 50. It appears that the IRS's total claim was $354,004.49 and the amount it admitted was dischargeable was $288,422.86. *See Chapter 13 Fee Application* at ¶ 2, *in* Appellant's App. at 31.

[15] *Chapter 13 Fee Application* at ¶ 2, *in* Appellant's App. at 31.

the secured and unsecured tax debts were dischargeable.[16] The complaint was not included in the record. Based on other documents, we gather that the thrust of Debtors' complaint was an objection to the validity of the IRS Notice of Tax Lien filed in Boulder County, Colorado, on October 25, 1999. The IRS's position was that the lien secured $62,594 of its claim.[17]

On November 21, 2006, Debtors filed a motion asking the bankruptcy court to stay plan confirmation proceedings pending outcome of the adversary proceeding against the IRS.[18] The bankruptcy court denied Debtors' motion, and soon thereafter also denied confirmation of the initial proposed Chapter 13 plan.[19] Over the next five months, Debtors filed three amended plans, all of which were objected to by Sally Zeman, the Chapter 13 trustee ("Trustee"), due to Debtors' failure to address their tax debts. Confirmation of each of these plans was denied by the bankruptcy court.[20]

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[16] *See Docket No. 25, in* Appellant's App. at 17; *Chapter 13 Fee Application in* Appellant's App. at 31.

[17] *See Stipulation to Dismiss, in* Appellant's App. at 26-27, *Chapter 13 Fee Application, in* Appellant's App. at 31, and *Transcript of Proceedings Held on February 4, 2008* ("*Tr.*") at 45, *in* Appellant's App. at 57.

[18] *Order on Fee Application* at 2, *in* Appellant's App. at 47.

[19] *Id.*

[20] *See Docket Nos. 36, 55 & 76, in* Appellant's App. at 16, 14 & 10. *See also Order on Fee Application at* 2, in Appellant's App. at 47.

In the mean time, Debtors and the IRS stipulated to dismissal of the adversary proceeding.[21] The stipulation was approved by order of the bankruptcy court dated February 26, 2007.[22] As part of the stipulation, Debtors agreed that the IRS's Notice of Tax Lien filed in 1999 perfected its interest in Debtors' personal property.[23] Additionally, the parties agreed that the amount of the IRS's secured claim ***in bankruptcy*** was only $14,594 because Debtors were not required to provide for the IRS as a secured creditor in their Chapter 13 Plan to the extent of their ERISA qualified retirement plan assets valued as of the bankruptcy petition date.[24] Further, the parties agreed that the IRS's lien continued as to those assets, and that the "IRS may collect up to the value of said ERISA plans after a discharge has been entered."[25]

On June 8, 2007, Debtors filed their fourth amended plan ("Plan"). The Plan drew no objections, and was confirmed by the bankruptcy court on July 3, 2007.[26] The record on appeal contains neither the Plan, nor the bankruptcy court's confirmation order.

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[21] *Stipulation to Dismiss, in* Appellant's App. at 26.

[22] *See Docket No. 57, in* Appellant's App. at 13.

[23] *Stipulation to Dismiss, in* Appellant's App. at 26-27.

[24] *Id.* at 27.

[25] *Id.*

[26] *See Docket No. 97, in* Appellant's App. at 7.

Attorney filed his Chapter 13 fee application ("Fee Application") on September 20, 2007, seeking total fees of $13,750, inclusive of the $4,750 already received from Debtors. Attorney attributed the additional $9,000 in fees to his work in the adversary proceeding. The Fee Application was filed almost three months out of time. Under Colorado local bankruptcy rules, Attorney was required to file his fee application in this case no later than "15 days after the date of the entry of the Order confirming the Chapter 13 plan."[27]

Trustee objected to the Fee Application for a variety of reasons:

1) Attorney's failure to timely file a Chapter 13 plan and the subsequent need for four additional amended plans; 2) Attorney's failure to timely file Form B22C; 3) Attorney's failure to timely file a Fee Disclosure Statement; 4) Attorney's filing of an unnecessary adversary proceeding; and 5) Attorney's excessive time entries for certain legal tasks performed in the case.[28] In response, Attorney asserted that, in light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the case was particularly difficult because it involved substantial tax liability,

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[27] *See Order on Fee Application* at 2 n.5, *in* Appellant's App. at 47. The application was filed 90 days out of time. The $4,750 paid by Debtors represents the $2,250 basic services fee plus the $2,500 retainer for the IRS adversary proceeding.

[28] *Order on Fee Application* at 2-3, in Appellant's App. at 47-48

and the fees requested were reasonable under the circumstances.[29] In further response to the Trustee's objection to his Fee Application, Attorney filed the required Fee Disclosure Statement on December 14, 2007, approximately 14 months after first receiving compensation from Debtors and filing the Chapter 13 petition.[30] The Fee Disclosure Statement is not a part of the record on appeal.

A hearing on the Fee Application was held on February 4, 2008, during which Trustee testified as an expert that Attorney's requested fees were unreasonable. Trustee testified that the fees were unreasonable primarily because most, if not all, experienced Chapter 13 practitioners would have employed the "cram-down" process to value the IRS's secured claim, rather than filing the adversary proceeding to determine dischargeability.[31] Further, Trustee testified that a reasonable fee would be $4,600.[32] That figure represents the current District of Colorado presumptively reasonable fee of $3,000, plus an additional ten billable hours at $165 per hour attributable to work related to the IRS tax lien issue.[33]

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[29] *Id.* at 3, *in* Appellant's App. at 48.

[30] *Id.* at 10, *in* Appellant's App. at 55.

[31] *Id.* at 4-5, *in* Appellant's App. at 49-50.

[32] *Id.* at 10-11, *in* Appellant's App. at 55-56.

[33] *Id.* The $50 discrepancy is unexplained. For Chapter 13 cases filed after January 1, 2007, the presumptively reasonable fee in the District of Colorado is $3,000. *See General Procedure*

(Continued on following page)

Attorney objected to Trustee's expert testimony regarding the reasonableness of his fees. The bankruptcy court overruled the objection, noting that several of the questions that Attorney asked Trustee were sufficient to "open the door" to allow Trustee to testify on the issue of reasonableness of fees.[34] Attorney admits that, prior to the hearing on the Fee Application, he was informed Trustee would "testify concerning [Attorney's] representation in the bankruptcy case, the reasonableness of requested fees in this bankruptcy and representation by other attorneys in cases similar to this case."[35] Again, the pleading at issue is not part of the record on appeal.

Order 2007-2 of the United States Bankruptcy Court for the District of Colorado. The presumptively reasonable fee technically applicable to this case is $1,800. *See General Order 2004-1 of the United States Bankruptcy Court for the District of Colorado.*

[34] *Tr.* at 69, *ll.* 5-6, *in* Appellant's App. at 62. We are unable to review the entire transcript of the February 4, 2008, hearing due to Attorney's failure to provide in his appendix "all transcripts, or portions of transcripts, necessary for the court's review," as required by 10th Circuit BAP Local Rule 8009-1(b)(5). Attorney provided only pages 45, 48, 58-59, 65, and 69-73, which consist of parts of Trustee's testimony on direct, cross, redirect, and recross examination. Additionally, Attorney did not provide the transcript cover page or index, so there is no way to determine the length of the entire transcript, or what parts have been left out. Our review is limited to those portions of the transcript contained in the Appendix.

[35] Appellant's Opening Br. at 17 (internal quotation marks omitted).

By order dated March 26, 2008, the bankruptcy court awarded Attorney fees of $4,750, the amount already received from Debtors ("Order on Fee Application"). On April 4, 2008, Attorney timely filed a "Rule 7052, 9023 Motion to Reopen and Reconsider" ("Motion to Reconsider") the bankruptcy court's Order on Fee Application.[36] The bankruptcy court denied Attorney's Motion to Reconsider by order dated June 9, 2008 ("Order Denying Reconsideration").[37] The Motion to Reconsider and the Order Denying Reconsideration are missing from the record on appeal. Attorney now timely appeals both of the bankruptcy court's orders.

II. JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[38]

Neither party elected to have this appeal heard by the United States District Court for the District of Colorado. The parties have thus consented to appellate review by this Court.

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[36] *See Docket No. 120, in* Appellant's App. at 5.

[37] *See Docket No. 132, in* Appellant's App. at 3.

[38] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[39] In this case, the bankruptcy court's Order on Fee Application and Order Denying Reconsideration have completely resolved the matter. Nothing remains for the bankruptcy court's consideration. Thus, the decision is final for purposes of review.[40]

III. STANDARD OF REVIEW

A bankruptcy court's "factual findings related to compensation awards under § 330 are reviewed under a clearly erroneous standard, and its ultimate decision to allow or disallow requested compensation is reviewed for abuse of discretion."[41] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[42] Additionally, "[j]udicial review of the bankruptcy court's factual determinations in connection with a

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[39] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[40] *See In re Tahah*, 330 B.R. 777, 780 (10th Cir. BAP 2005).

[41] *In re Commercial Fin. Svcs.*, 298 B.R. 733, 747 (10th Cir. BAP 2003), *aff'd*, 427 F.3d 804 (10th Cir. 2005) (footnote omitted).

[42] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. Le Maire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

fee award is highly deferential . . . "[43] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.' "[44]

IV. ANALYSIS

A. Order on Fee Application

On appeal, Attorney argues two bases for reversal of the bankruptcy court's Order on Fee Application. First, Attorney complains that Trustee's testimony on the reasonableness of his fees should not have been admitted as expert testimony. Second, Attorney asserts the bankruptcy court erred in disallowing more than one-half of his requested fees because the adversary proceeding against the IRS was necessary and beneficial to Debtors, and therefore reasonable. We reject both arguments.

1. Trustee's expert testimony

In his opening brief, Attorney argues that Trustee should not have been allowed to testify as an expert because she was not disclosed as an expert

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[43] *In re Commercial Fin. Svcs.*, 298 B.R. at 747.

[44] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

witness as required by Federal Rule of Civil Procedure 26(a)(2).[45] Attorney also argues for exclusion of Trustee's testimony because Trustee did not file a written report that he perceives was required by Federal Rule of Procedure 26(a)(2)(B).[46] These provisions of the Federal Rules of Civil Procedure apply in this contested matter only if the bankruptcy court specifically directed that they be applicable.[47] There is nothing in the record to verify

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[45] Appellant's Opening Br. at 16-17. Federal Rule of Civil Procedure 26(a)(2) provides as follows:

> (2) Disclosure of Expert Testimony.
>
> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to the other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

Fed. R. Civ. P. 26(a)(2) (2006).

[46] Appellant's Opening Br. at 17. Federal Rule of Civil Procedure 26(a)(2)(B) provides in pertinent part:

> (2) Disclosure of Expert Testimony.
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

Fed. R. Bankr. P. 26(a)(2)(B) (2006).

[47] Fed. R. Bankr. P. 9014(c).

that the bankruptcy court in fact ordered them applicable in this matter. However, in her answer brief, Trustee admits that "the bankruptcy court, in its Minutes of Proceedings dated December 3, 2007, ordered disclosure of expert testimony and pretrial disclosures pursuant to Rule 26(a)(2) and (3) of the Federal Rules of Civil Procedure."[48] Trustee also admits she did not comply with these procedural requirements. An appellate court reviews the lower court's "evidentiary rulings, including its decision to admit or deny expert testimony, for an abuse of discretion."[49] We find no such abuse for the following reasons.

Attorney fails to demonstrate how he was prejudiced by Trustee's discovery omissions. Attorney admits that Trustee filed a list of witnesses indicating that Trustee would be called to testify "concerning [Attorney's] representation in the bankruptcy case; the reasonableness of requested fees in this bankruptcy [case;] and representation by other attorneys in cases similar to this case."[50] Based upon those portions of the transcript provided to us, it appears that Trustee actually testified only to matters falling within this disclosed description of testimony. In addition, the bankruptcy court found that Attorney waived his right to object to Trustee's

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[48] Appellee's Answer Br. at 7.

[49] *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1222 (10th Cir. 2005) (internal quotation marks omitted).

[50] Appellant's Opening Br. at 17.

testimony because Attorney asked Trustee for her opinions about the reasonableness of fees at least six times.[51] There is nothing in the abridged transcript before us that suggests error in the bankruptcy court's finding of waiver. Appellant has provided us with nothing to support "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[52]

A careful review of the Order on Fee Application reveals that the bankruptcy court did not rely solely on Trustee's "expert testimony" in determining a reasonable fee. The bankruptcy court specifically stated:

> [Attorney] provided the Court with certain exhibits (including case law and scholarly articles) upon which he purportedly relied on determining to file the Adversary Proceeding. The Court has reviewed these exhibits and finds none of them, *per se*, support the filing of an adversary proceeding under circumstances similar to this case. Although the case and articles have some applicability to this case because they address the dischargeability of taxes in a Chapter 13 context, their relevance under the specific facts of this case

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[51] *Tr.* at 69, *ll.* 5-6, *in* Appellant's App. at 62.

[52] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

> is questionable. In addition, at the evidentiary hearing, it became evident that [Attorney] was not cognizant of the fact he could treat the IRS's claims through the plan.[53]

Additionally, much of what Trustee testified to is within the bankruptcy court's knowledge. As more than one court has opined:

> On the issue of reasonable fees, "the court is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of testimony of witnesses as to value."[54]

We reject Attorney's argument regarding the admissibility of Trustee's expert testimony.

2. Reasonableness of requested fees

Section 330(a)(4)(B) provides as follows:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may

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[53] *Order on Fee Application* at 6, *in* Appellant's App. at 51 (citation and footnote omitted). This Court has also reviewed the authorities provided by Attorney and agrees with the bankruptcy court that they do not directly support his argument.

[54] *Schilling v. Moore,* 286 B.R. 846, 850 (W.D. Ky. 2002) (quoting *In re WHET, Inc.*, 61 B.R. 709, 713 (Bankr. D. Mass. 1986)).

> allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.[55]

The critical question in awarding fees to counsel in Chapter 13 cases is whether the services were of benefit and necessity to the debtor.[56] Generally speaking, in bankruptcy cases, the lodestar method, namely number of hours expended times customary hourly rate, is used to determine attorney fees.[57] The lodestar figure may then be adjusted up or down depending on various factors.[58] The leading case regarding adjustment of the lodestar figure, *Johnson v. Georgia Highway Express, Inc.*, outlined twelve factors to be used to determine a reasonable attorney fee.[59] The Tenth Circuit has adopted the *Johnson* factors in deciding the reasonableness of attorney fees.[60] These twelve factors are:

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[55] § 330(a)(4)(B).

[56] *In re Phillips*, 291 B.R. 72, 80 (Bankr. S.D. Tex. 2003).

[57] *In re Miniscribe Corp.*, 309 F.3d 1234, 1243 (10th Cir. 2002).

[58] *Id.*

[59] *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated on other rounds by Blanchard v. Bergeron*, 498 U.S. 87 (1989) (hereafter "*Johnson*").

[60] *In re Permian Anchor Svcs., Inc.*, 649 F.2d 763, 768 (10th Cir. 1981) (citing *Johnson*) (also commenting that "[n]early

(Continued on following page)

1. The time and labor required.
2. The novelty and difficulty of the question.
3. The skill requisite to perform the legal service.
4. The preclusion of other employment by the attorney due to the acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the attorneys.
10. The "undesirability" of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.[61]

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identical guidelines have been adopted by the American Bar Association Code of Professional Responsibility, DR 2-106").

[61] *Johnson*, 488 F.2d at 717-19.

Most of the *Johnson* factors have now been codified in §330(a)(3).[62]

In its Order on Fee Application, the bankruptcy court appropriately analyzed the *Johnson* factors in determining whether Attorney's requested fees were reasonable. In doing so, the bankruptcy court specifically found that: 1) a large portion of the time billed by Attorney was unnecessary;[63] 2) the case did not involve novelty or difficulty as compared to other

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[62] Section 330(a)(3) provides:

> In determining the amount of reasonable compensation to be awarded . . . the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –
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> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

[63] *Order on Fee Application* at 5, *in* Appellant's App. at 50.

Chapter 13 cases;[64] 3) Debtors' tax liability did not require advanced skill in order to propose a confirmable plan;[65] 4) Attorney provided insufficient evidence regarding whether other employment opportunities were precluded;[66] 5) the case involved a mixed flat and hourly fee;[67] 6) the case involved no expedited or emergency circumstances justifying an elevated fee request;[68] 7) the result obtained in the case weighs in favor of a higher than typical fee award; and 8) Attorney had general experience with respect to Chapter 13 cases, but admitted this was the first case he had handled involving substantial tax liability.[69] We review these findings under the clearly erroneous standard. A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[70] Attorney points to no evidence in the record to convince us that any of the bankruptcy court's findings are clearly erroneous.

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[64] *Id.* at 6, *in* Appellant's App. at 51.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 7, *in* Appellant's App. at 52.

[68] *Id.*

[69] *Id.* at 7-8, *in* Appellant's App. at 52-53.

[70] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. Le Maire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

The bankruptcy court also addressed Trustee's other objections to Attorney's Fee Application. The bankruptcy court found that the case was not handled in a timely or particularly competent manner.[71] Further, with regard to Attorney's time entries, the bankruptcy court found that the detail and description of the legal services were woefully inadequate and prevented it from determining whether the time was reasonable.[72] Again, Attorney has not demonstrated that these findings are clearly erroneous. Any and all of these findings support the decision of the bankruptcy court to award a fee lower than the requested amount.

The bankruptcy court correctly explained that Attorney's non-compliance with § 329 and Rule 2016 in failing to timely file the required Fee Disclosure Statement could serve as a basis for disallowing ***any and all*** compensation.[73] Attorney did not file the Fee

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[71] *Order on Fee Application* at 8, *in* Appellant's App. at 53.

[72] *Id.* at 9, *in* Appellant's App. at 54.

[73] *Id.* at 9-10, *in* Appellant's App. at 54-55. Section 329(a), Debtor's transactions with attorneys, provides:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection

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Disclosure Statement until: 1) after he had untimely filed his Fee Application; and 2) after Trustee had objected to the Fee Application, in part, on the grounds of his failure to file a Fee Disclosure Statement. Timely filing of the required Fee Disclosure Statement serves the important policy of protecting both creditors and debtors against over-reaching attorneys, thus justifying the potentially stiff penalty of disgorging fees already received.[24] In this case, notwithstanding Attorney's failure to timely

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with the case by such attorney, and the source of such compensation.

Rule 2016, Compensation for Services Rendered and Reimbursement of Expenses, provides:

> (b) Disclosure of compensation paid or promised to attorney for debtor
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> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Fed R Bankr P 2016(b).

[24] *In re Kisselberth*, 273 F 3d 714, 721 (6th Cir 2001).

file a Fee Disclosure Statement, the bankruptcy court permitted him to keep the $4,750 already paid by Debtors.

The bankruptcy court's "ultimate decision to allow or disallow requested compensation is reviewed for abuse of discretion."[75] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[76] When, as here, the bankruptcy court would have been well within its discretion to deny Attorney ***all*** requested fees and order disgorgement, it is difficult to understand how the award of $4,750 constitutes an abuse of discretion.

In sum, we conclude that the bankruptcy court: 1) used the appropriate factors to examine and evaluate the Fee Application; 2) conducted a thorough analysis of all of the bases for Trustee's objection; 3) did not make any findings of fact that the record on appeal demonstrates were clearly erroneous; and 4) issued a well-supported and well-reasoned decision.

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[75] *In re Commercial Fin. Svcs.*, 298 B.R. 733, 747 (10th Cir. BAP 2003), *aff'd*, 427 F.3d 804 (10th Cir. 2005).

[76] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

Therefore, the bankruptcy court did not abuse its discretion in making its fee award to Attorney.

B. Order Denying Reconsideration

On April 4, 2008, Attorney timely filed his Motion to Reconsider the bankruptcy court's Order on Fee Application.[77] The bankruptcy court entered its Order Denying Reconsideration on June 9, 2008.[78] The Notice of Appeal filed by Attorney can be interpreted as appealing both the Order on Fee Application and the Order Denying Reconsideration.[79] However, neither the Motion to Reconsider, nor the Order Denying Reconsideration are contained in the record on appeal provided by Attorney.

As appellant, Attorney has the burden of providing this appellate court with an adequate record for review.[80] As a part of that record, Attorney is required to include in his appendix the order from which the appeal is taken and the motion and response on which the court rendered decision.[81]

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[77] *See Docket No. 120, in* Appellant's App. at 5.

[78] *See Docket No. 132, in* Appellant's App. at 3. This entry reflects that Attorney's motion was a "Rule 7052, 9023 Motion to Reopen and Reconsider Order."

[79] *See Notice of Appeal, in* Appellant's App. at 80.

[80] *Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756, 760-61 (10th Cir. BAP 2006).

[81] Fed. R. Bankr. P. 8006 & 8009(b); 10th Cir. BAP L.R. 8006-1(a) & 8009-1(b)(5). Specifically, Rule 8009(b) provides:

(b) Appendix to Brief.

(Continued on following page)

"Indeed, when the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, this Court is unable to rule on that issue and may summarily affirm the bankruptcy court."[82]

> If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:
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> (1) The complaint and answer or other equivalent pleadings;
>
> (2) Any pretrial order;
>
> (3) The judgment, order, or decree from which the appeal is taken;
>
> (4) Any other orders relevant to the appeal;
>
> (5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
>
> (6) ***Any motion and response on which the court rendered decision***;
>
> (7) The notice of appeal;
>
> (8) The relevant entries in the bankruptcy docket; and
>
> (9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

Fed. R. Bankr. P. 8009(b) (emphasis added). We note that the bankruptcy court's Order Denying Reconsideration is technically before this Court because it was a part of the preliminary transmission of the record accomplished pursuant to 10th Circuit BAP Local Rule 8006-1(a). However, we are still without Attorney's Motion to Reconsider, *see Docket No. 120, in* Appellant's App. at 5, and Trustee's response thereto, *see Docket No. 128, in* Appellant's App. at 4, and thus the inadequate record on appeal precludes our review.

[82] *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000).

Because Attorney failed to provide an adequate record for our review, we are compelled to affirm the bankruptcy court's Order Denying Reconsideration.

V. CONCLUSION

The Order on Fee Application and the Order Denying Reconsideration are affirmed.

RASURE, Bankruptcy Judge, concurring in result:

I concur that the bankruptcy court must be affirmed, but on the ground that the appendix tendered by Attorney does not contain sufficient excerpts of the record to conduct a meaningful review of the issues appealed.

Attorney presented two issues for review: (1) whether the bankruptcy court erred in allowing expert testimony of the Trustee which had not been disclosed as required by Federal Rule of Civil Procedure 26(a)(2),[1] and (2) whether the bankruptcy court erred in refusing to award any attorney fees for Attorney's prosecution of the adversary proceeding in which Attorney obtained a stipulation from the IRS regarding the amount, priority and dischargeability of the Debtors' income taxes.[2]

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[1] *See* Appellant's Opening Br. at 17-20.

[2] *See id.* at 20-23.

With respect to the first issue, Attorney argues that the bankruptcy court allowed the Trustee to testify as an expert on the issue of the dischargeability of taxes in a Chapter 13 case notwithstanding her failure to disclose the substance of her proposed testimony on that issue in her pretrial disclosures. In its Order on Fee Application, the bankruptcy court relied heavily on the Trustee's opinion that the adversary proceeding was unnecessary and services related to it were not compensable.[3] Arguably, Attorney may have been prejudiced because he was not afforded notice that the Trustee would give such an expert opinion and therefore did not obtain his own expert on the issue of dischargeability of taxes in a Chapter 13 case. The majority concludes that the bankruptcy court found that Attorney waived his right to object to the Trustee's testimony as an expert because "Attorney asked Trustee for her opinions about the reasonableness of fees at least six times."[4] Because the complete transcript was not furnished in the appendix, I cannot determine what particular questions Attorney asked that might have led the bankruptcy court to conclude that Attorney waived his objection to undisclosed expert testimony regarding *whether the adversary proceeding was necessary to address dischargeability of the taxes*, nor can I render a legal conclusion as to whether such

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[3] *See* Order on Fee Application at 4-5, *in* Appellant's App. at 49-50.

[4] *Majority Opinion* at 12.

questions would have constituted waiver of Attorney's Rule 26 objection.

With respect to the second issue on appeal, I believe that the bankruptcy court's conclusions that the adversary proceeding was unnecessary, and that the Debtors could have obtained the same relief through the confirmation process, is a mixed question of law and fact. Mixed questions of law and fact are reviewed under either the clearly erroneous standard or the *de novo* standard, "depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."[5]

The bankruptcy court found the adversary proceeding unnecessary based on its and the Trustee's belief that the unsecured portion of the taxes was *a priori* dischargeable because the IRS filed a proof of claim admitting that approximately eighty percent of its claim was unsecured. In its Order on Fee Application, the bankruptcy court stated: "the proof of claim filed by the IRS . . . prior to the date [Attorney] filed the Adversary Proceeding, admitted $288,422.86 of its tax claim was considered by the IRS to be an unsecured general claim, thereby conceding the dischargeability of this amount."[6] Because unsecured federal income taxes can be excepted from a Chapter 13 discharge in certain instances under Section

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[5] *Armstrong v. Comm'r*, 15 F.3d 970, 973 (10th Cir. 1994).

[6] *Order on Fee Application* at 5, *in* Appellant's App. at 50.

1328(a),[7] the fact that the IRS conceded that the bulk of its claim was unsecured was not necessarily dispositive of dischargeability.[8]

Attorney did not include in his appendix the IRS's proofs of claim, the adversary complaint, the IRS's answer, the installment agreement, or other evidence presented to the bankruptcy court concerning the timing of the assessment of the taxes, or regarding the nature of the taxes (and perhaps penalties and interest). In the absence of an appendix sufficient for meaningful review of the facts that the

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[7] Section 1328(a) excepts from discharge taxes "of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B) [and] (1)(C) . . . of section 523(a)." 11 U.S.C. § 1328(a)(2). These include taxes assessed upon a late return that was filed within the two year period prior to the bankruptcy petition, and taxes assessed after the debtor "made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(B) and (C).

[8] A claimant is not required to, and generally does not, indicate in its proof of claim whether it believes its claim is dischargeable. Moreover, in the case of taxes and penalties, the claimant does not need to file an adversary proceeding to have its claim declared non-dischargeable, as Section 523(a)(1) is self-executing. Thus, a debtor who is uncertain whether taxes and penalties will be discharged, or desires to confirm that the taxes will be discharged upon completion of a Chapter 13 plan, may indeed desire to obtain a binding determination of dischargeability through an adversary proceeding. It appears that in the Stipulation to Dismiss filed in the adversary proceeding, the Debtors may have benefitted from a stipulation that "1991 through 1994, inclusive, taxes are discharged upon completion of Chapter 13 plan payments." *Stipulation to Dismiss, in* Appellant's App. at 27.

bankruptcy court considered in concluding that the IRS "conceded" that its claim was dischargeable, that dischargeability was not a legitimate issue in the case, and that the Debtors did not benefit from the adversary proceeding, the bankruptcy court must be summarily affirmed.[9]

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[9] *See Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979-80 (10th Cir. 1992).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero

In re:	)	
	)	
WILLIS RAY MATNEY	)	Case No. 06-16296
PAMELA KAY MATNEY	)	
	)	MER Chapter 13
Debtors.	)	

ORDER

THIS MATTER comes before the Court on the Chapter 13 Fee Application (the "Fee Application") filed by John E. Fitzgibbons, Esq. ("Fitzgibbons") and the objection thereto (the "Objection") filed by the Standing Chapter 13 Trustee ("Trustee"). The Court has considered the evidence and legal arguments presented by the parties, and hereby makes the following findings of fact and conclusions of law.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and (b) and 157(a) and (b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) as it is a matter concerning the administration of the estate.

BACKGROUND FACTS

Willis and Pamela Matney (collectively the "Debtors") filed their Chapter 13 case on September 12,

2006.[1] The following day, the Court issued a Notice of Deficiency for Omission of Information (the "Deficiency Notice") requiring the Debtors to file a Statement of Financial Affairs, a Chapter 13 Statement of Current Monthly Income, Employee Income Records, a Chapter 13 Plan, Schedules G-J, as well as other necessary documents, all of which were due on September 28, 2006. None of the previously mentioned documents were filed until, at the earliest, October 11, 2006.

On October 25, 2006, the Trustee filed a Motion for Entry of Dismissal Order (the "Dismissal Motion") based on the Debtors' failure to remedy all deficiencies indicated in the Deficiency Notice by the cure date, as well as the fact the Debtors had filed a blank statement of current monthly income and only one payment advice. The Debtors objected to the Dismissal Motion and subsequently filed an amended statement of current monthly income and Schedules I and J. The Debtors' initial Chapter 13 Plan was filed on November 3, 2006, some 52 days after their voluntary petition.

On November 20, 2006, the Debtors filed Adversary Proceeding No. 06-1906 MER (the "Adversary Proceeding"). The Adversary Proceeding was filed against the United States of America, Department of

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[1] Fitzgibbons represented the Debtors throughout this case and all documents referred to herein were filed by Fitzgibbons on the Debtors' behalf.

Treasury, Internal Revenue Service (the "IRS") and sought to discharge certain tax debts owed to the IRS pursuant to 11 U.S.C. §§ 727, 523(a) and 507(a)[2] of the Bankruptcy Code. The following day, the Debtors filed a motion seeking to hold their Chapter 13 confirmation hearing in abeyance until determination of the Adversary Proceeding. This motion was denied. Five days later the Court also denied confirmation of the Debtors' initial Chapter 13 Plan.

Over the next one and one-half years, three additional amended plans were filed. The Trustee objected to each of these plans based on the Debtors' failure to adequately and properly address their tax debts.[3] On or about February 16, 2007, approximately fifteen months after the Adversary Proceeding was commenced, the Debtors and the IRS settled their dispute.[4] Finally, on June 8, 2007, the Debtors filed

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[2] Unless otherwise specified, all future statutory references in the text are to title 11 of the United States Code.

[3] The Trustee also objected to the Debtors' Chapter 13 plan on other grounds less relevant to the matters before the Court. Thus, the Court will not delve into each of the objections filed to the Debtors' numerous proposed plans.

[4] The settlement provided the Debtors were to pay the IRS's secured claim in the amount of $14,594 through their plan. The remainder of the IRS claim would be unsecured and discharged, assuming all plan payments were completed and the Debtors received their discharge. In addition, the IRS reserved the right (and the Debtors agreed) to execute on the Debtors' qualified retirement funds outside of the bankruptcy case. Interestingly, approximately two and one-half months after this settlement,

(Continued on following page)

their fourth amended Chapter 13 plan to which no objections were filed. On July 3, 2007, the Court entered an order confirming the Debtors' fifth Chapter 13 Plan dated June 6, 2007.

Thereafter, on September 20, 2007,[5] Fitzgibbons filed his Fee Application requesting $13,750.00 in legal fees and $14.68 in out-of-pocket expenses.[6] On October 15, 2007, the Trustee filed her Objection to the Fee Application asserting numerous deficiencies related to Fitzgibbons's prosecution of the case, as well as deficiencies associated with the Fee Application itself. Specifically, the Trustee's Objection raises the following issues: 1) Fitzgibbons's failure to follow Transitional Local Bankruptcy Rule 3015-1 with regard to the filing and prosecution of this Chapter 13 case, including, but not necessarily limited to, the untimely filing of the Debtors' first Chapter 13 plan

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the Debtors filed their 3rd amended Chapter 13 plan which did not incorporate the terms of their agreement.

[5] The Application was not timely filed. Second Amended General Procedure Order No. 2001-1, which is applicable to this case, indicates applications for compensation in Chapter 13 cases "shall be filed within 15 days after the date of the entry of the Order confirming the Chapter 13 plan. . . ." *Second Amended General Procedure Order No. 2001-1*, p. 1. Fitzgibbons's Fee Application was filed 90 days after the date required by the general procedure order.

[6] Fitzgibbons had previously received $4,750, either prior to the Debtors' bankruptcy filing or during the bankruptcy case. It is unknown how much Fitzgibbons was initially paid due to his failure to file an attorney fee disclosure in compliance with FED. R. BANKR. P. 2016(b).

and the subsequent need for four additional amended plans and Fitzgibbons's failure to timely file a statement of current income for the Debtors, which, when ultimately filed, was left blank (with the exception of one line) and required two further amendments; 2) Fitzgibbons's failure to file an attorney fee disclosure as is required by FED. R. BANKR. P. 2016(b); 3) the unnecessary filing of the Adversary Proceeding; and 4) the excessive amount of time spent and fees charged for many of the legal tasks performed in this case. Fitzgibbons asserts, notwithstanding the Trustee's Objection to his fees, this case was particularly difficult as it involved substantial tax liability and therefore the requested fees are reasonable under the circumstances.

DISCUSSION

Chapter 13 debtor's counsel may apply for compensation under § 330(a)(4)(B), which states in relevant part:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). The Court shall not allow compensation except as provided above for services that are unnecessarily duplicative, services not

reasonably likely to benefit a debtor's estate or were not necessary for the administration of the case. *See* 11 U.S.C. § 330(a)(4)(A). "It is the burden of the party applying for attorney fees to establish the extent and reasonableness of the request, supporting the claim with 'meticulous, contemporary time records.'" *Mann v. Reynolds*, 46 F.3d 1055, 1062 (10th Cir. 1995) (*citing Ramos v Lamm*, 713 F.2d 546, 553 (10th Cir. 1983)).

In determining whether requested fees are reasonable, the Tenth Circuit Court of Appeals has adopted the analysis set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974). *See Matter of Permian Anchor Services*, 649 F.2d 763, 768 (10th Cir. 1981) (the guidelines set forth in *Johnson v. Georgian Highway Express, Inc.* should apply to a determination of reasonable attorney's fees in a bankruptcy case). The *Johnson* factors, as they are commonly called, are as follows:

> 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the

professional relationship with the client; 12) awards in similar cases.

Johnson, 488 F.2d at 717-20. Many of these factors have been codified in § 330(a)(3). In this case, the Trustee's Objection can be analyzed in part under *Johnson*. The Court will address separately those individual objections not lending themselves to analysis under the *Johnson* test.

A. The *Johnson* Factors

1. Time and Labor Required

In the Application, Fitzgibbons categorizes his time and fees incurred in this case as follows:

Description of Service	Hours	Rate	Total
Basic Services		Flat Fee	$2,250.00
Investigation/ Preparation/Filing of Adversary Proceeding	33.35 hours	$165.00/ hour	$5,502.75
Negotiations with IRS	32.17 hours	$165.00/ hour	$5,309.35
Drafting Plan/ IRS Settlement	32.50 hours	$165.00/ hour	$5,362.50
Miscellaneous	5.7 hours	$165.00/ hour	$940.50
Total	103.72 hours		$19,365.10

The Application indicates Fitzgibbons has received $4,750 to date and that he is requesting an additional $9,000 to be paid through the Debtors' Chapter 13 plan. Therefore, it appears Fitzgibbons is waiving a portion of his fees in the approximate amount of $5,615.02.

With regard to the amount of time involved in this case, Fitzgibbons testified he was concerned about the amendments made to the Bankruptcy Code by the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and therefore believed it prudent to file the Adversary Proceeding to attempt to deal with the Debtors' significant tax liability. He indicated the additional $9,000 resulted from his legal services in connection with Adversary Proceeding.

However, even considering Fitzgibbons's waiver of some of the fees incurred in this case, the Trustee asserts both the time and the labor spent are excessive, primarily, although not exclusively, based on the filing of Adversary Proceeding. The Trustee specifically contends there was no need to file the Adversary Proceeding to address the proof of claim filed by the IRS, testifying most, if not all, experienced Chapter 13 practitioners would have employed the "cramdown" process available to Chapter 13 debtors to value the IRS's secured claim rather than filing an adversary proceeding to determine dischargeability. Further, according to the Trustee, the IRS tax issue should have been handled at the outset of the case and should have required no more than the filing of

two Chapter 13 plans, rather than the five plans filed by Fitzgibbons. The Trustee asserts the extraordinary fees billed in this case arose in part from Fitzgibbons's unfamiliarity with Chapter 13 law and procedure and should not be born by creditors of this Estate.

The Court agrees with the Trustee the time and labor expended in this case are both significant in light of the legal issues presented. While the filing of an adversary proceeding is not precluded under the circumstances, the handling of secured and unsecured taxes through the Chapter 13 confirmation process, absent extenuating circumstances,[7] is the most expeditious and economical path to resolving these issues. In addition, as the Trustee noted, the proof of claim filed by the IRS on October 5, 2006, prior to the date Fitzgibbons filed the Adversary Proceeding, admitted $288,422.86 of its tax claim was considered by the IRS to be an unsecured general claim, thereby conceding the dischargeability of this amount. *See Claim No. 5.*[8] Thus, the Court finds

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[7] Importantly, Fitzgibbons presented no testimony the Debtors' tax liability was potentially subject to nondischargeability due to the Debtors' failure to file, or with respect to a fraudulent return or a willful attempt to evade of defeat a tax. *See* 11 U.S.C. § 523(a)(1). Moreover, the Trustee testified assessments were made by the IRS demonstrating the taxes were filed, and that no fraud allegations were ever asserted by the IRS. Thus, nondischargeability under § 523(a)(1) was never an issue in this case.

[8] The parties requested the Court take judicial notice of the Claims Register in this case which request the Court granted.

although much time and labor was expended in this case, a large portion of the billed time was unnecessary.

2. Novelty and Difficulty of the Question

Fitzgibbons argues this was an extremely difficult tax case in which several proofs of claim were filed by the IRS. In addition, he asserts the Debtors had entered into a pre-petition Installment Agreement with the IRS which made the tax matters more difficult. By contrast, the Trustee maintains this case, while more difficult than some, was a standard case even considering the significant amount of tax debt asserted by the IRS and the existence of the Installment Agreement.

This case was filed approximately eleven months after the enactment date of BAPCPA. It is generally understood that BAPCPA has added additional burdens on debtor's counsel. *In re Mayer*, 2006 WL 2850451, *1 (Bankr. D. Kan. 2006) (unpublished). However, the Trustee stated this case could have been handled in the same manner as Pre-BAPCPA cases by providing for the IRS's claims through the plan confirmation process. She also testified she believed the Installment Agreement was terminated upon the filing of the bankruptcy case and that all tax claim issues were then handled through the IRS's filing of a proof of claim.

Fitzgibbons provided the Court with certain exhibits (including case law and scholarly articles) upon

which he purportedly relied in determining to file the Adversary Proceeding. *See Fitzgibbons Exhibits* 3 and 7-9. The Court has reviewed these exhibits and finds none of them, *per se*, support the filing of an adversary proceeding under circumstances similar to this case. Although the cases and articles have some applicability to this case because they address the dischargeability of taxes in a Chapter 13 context, their relevance under the specific facts of this case is questionable.[9] In addition, at the evidentiary hearing, it became evident that Fitzgibbons was not cognizant of the fact he could treat the IRS's claims through the plan.

Therefore, the Court agrees with the Trustee's argument and finds, although BAPCPA has placed additional burdens on debtors and their counsel, nothing in BAPCPA precluded Fitzgibbons from implementing the provisions of §§ 1325(a)(5) and 506 and providing for the IRS's tax liability through the Debtors' Chapter 13 plan rather than using the more costly and time-consuming route of filing the Adversary Proceeding. Accordingly, the Court finds although this case involved substantial tax liability, the novelty or difficulty of the case was not unusual

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[9] In addition, the Court has reviewed the Stipulation to Dismiss entered into by the IRS and the Debtors and finds the stipulation discharges the unsecured portion of the Debtors' tax liability upon the completion of chapter 13 plan payments and not by virtue of the stipulation itself. Thus, the treatment of the Debtors' tax liability is no different than if the Debtors had provided for their tax liability through their Chapter 13 plan.

compared to other Chapter 13 cases coming before this Court.

3. The Skill Requisite to Perform the Legal Service Properly

As indicated above, this case is not unusual, with the exception of the Debtors' significant tax liability. In fact, the Trustee testified most Chapter 13 practitioners would handle this case easily and without the filing of an Adversary Proceeding. Moreover, the treatment of the Debtors' tax liability did not require advanced skill in order to perform the legal tasks associated with proposing a confirmable plan.

4. The Preclusion of other Employment by the Attorney due to Acceptance of the Case

Fitzgibbons provided the Court with little to no evidence regarding whether other employment opportunities were precluded by the filing and prosecution of this case. Thus, the Court is unable to weigh this factor.

5. The Customary Fee and whether the Fee is Fixed or Contingent

With regard to the fifth and sixth *Johnson* factors, the Court finds the Debtors' Chapter 13 case was filed on September 12, 2006, and therefore, the

Court's Second Amended General Procedure Order Number 2001-1 applies to this case.[10] Thus, a customary fee, or at least a fee that was presumably reasonable in Chapter 13 cases at the time, was $1,800. This number in no way reflects a cap on fees in Chapter 13 cases, it merely provides a fee that under typical circumstances will be presumed to be reasonable, absent an objection from a creditor or the Trustee or upon further review by the Court. However, while the presumptive $1,800 fee offers one measure of the customary fee at the time the case was filed, the Trustee testified she believed a fee in the amount of $4,600 would be a customary fee in a similarly-situated case.

With regard to the fixed or contingent nature of the fee, it appears, Fitzgibbons charged a flat fee of $2,250 for preparing and filing the Debtors' pleadings which included representing the Debtors at the § 341 meeting of creditors. Thereafter, Fitzgibbons charged the Debtors $165.00 per hour for additional services, which rate the Court finds to be reasonable based on hourly rates charged by other Chapter 13

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[10] General Procedure Order 2004-1 which became effective on July 1, 2004, in effect, increased the fees presumed to be reasonable under the Second Amended General Procedure Order No. 2001-1 from $1,700 to $1,800. The presumable reasonable fee in Chapter 13 cases was increased by General Procedure Order No. 2007-2 (addressing Chapter 13 fees in light of BAPCPA requirements) which indicates $3,000 is the amount now presumed to be reasonable. However, this amount only applies to cases filed on or after January 1, 2007.

practitioners. Thus, this case incorporates a mixed flat and hourly fee.

6. The Time Limitations Imposed by the Client or the Circumstances

No evidence was presented indicating special time limitations or circumstances regarding the filing of this case. Similarly, the circumstances of the case do not otherwise indicate expedited or emergency circumstances to justify an elevated fee request.

7. The Amount Involved and the Results Obtained

As indicated previously, the dollar amounts being requested in this case are much higher than what is requested in typical Chapter 13 fee applications. However, this is not to say the amount requested cannot be awarded in special cases.

With regard to the results obtained in this case, the Debtors have received substantial relief in this case and the outcome was positive. Thus, the result obtained in this case weighs in favor of a higher than typical fee award.

8. The Experience, Reputation and Ability of the Attorneys

Fitzgibbons stated he files several Chapter 13 cases each year. He indicated in the year prior to filing the Debtors' case he had filed ten to fifteen

Chapter 13 cases and in the year prior to that, he had filed approximately twenty Chapter 13 cases. Thus, Fitzgibbons presumably has some experience handling Chapter 13 cases. However, Fitzgibbons admitted this case was the first Chapter 13 case he had filed involving substantial tax liability. No testimony was elicited with regard to Fitzgibbons's reputation.

9. The "Undesirability" of the Case; the Nature and Length of the Professional Relationship with the Client; Awards in Similar Cases

No testimony was elicited at the evidentiary hearing with regard to the *Johnson* factors 10, 11 and 12. However, the Court notes it is permissible for it to use its own experience in evaluating fee requests. *See In re Frontier Airlines, Inc.*, 74 B.R. 973, 978 (Bankr. D. Colo. 1987). With regard to *Johnson* factor 12, *i.e.*, awards in similar cases, the Court has awarded attorney fees in Chapter 13 cases ranging from $1,800 to in excess of $33,000, the latter being an extremely difficult and highly contested case involving a myriad of novel legal issues and requiring multiple days of trial. Based on the Court's experience in reviewing fee applications, this case falls much closer to the lower range of fees it has awarded.

B. The Trustee's Other Objections

1. Timeliness and Competence

In addition to her objections incorporated into this Court's analysis of the *Johnson* factors, the Trustee

challenges the fees requested by Fitzgibbons based on his failure to timely and competently prosecute this case. She pointed out the initial Chapter 13 plan was not filed until after the § 341 meeting had occurred in this case, far later than allowed by local rules. The Court agrees. Fitzgibbons did not file the Debtors' Chapter 13 plan until November 3, 2006, some 52 days after the Debtors' initial voluntary petition. Transitional Local Bankruptcy Rule 3015-1, which is applicable to this case indicates, "[t]he plan should be filed with the petition." T.L.B.R. 3015-(a)(1). However, "[i]t must be filed no later than fifteen days after the petition." *Id.*

The Trustee also asserts Fitzgibbons did not file other documents required by the Deficiency Notice until, at the earliest October 11, 2006, approximately two weeks subsequent to the established deadline to cure the identified deficiencies. In addition, the Trustee asserts the Debtors' original statement of current monthly income was filed without any meaningful information (except line 16 which indicated the Debtors' median income was $56,024). The Court's docket corroborates the Trustee's assertions and Fitzgibbons did not attempt to explain these deficiencies at the hearing. Further, the Court notes the Fee Application was filed 90 days after the date which is allowed by the Court's general procedure Order. *See Second Amended General Procedure Order No. 2001-1*, p. 1.; *see also note* 3, *infra*.

2. Excessive Charges

The Trustee also argues several of the legal services provided by Fitzgibbons and the time entries associated with those services are excessive. Unfortunately, the Trustee's Objection fails to list with specificity the time entries she is challenging, making the Court's analysis of this objection needlessly difficult. However, the Court has reviewed the time invoices attached to Fitzgibbons's Fee Application, *see Exhibits A-D*, and finds the detail and description of the legal services set forth therein to be woefully inadequate to allow the Court to determine whether the amount of time for such legal services was reasonable. *See In re Colorado-Ute Elec. Ass'n, Inc.* 132 B.R. 174, 177 (Bankr. D. Colo. 1991) ("In order to sustain [applicant's] burden, the entries on the billing statements must contain adequate detail and analysis of each task so that a Court can discern the nature and value of the services.").

For example, in one time entry dated July 31, 2007, Fitzgibbons billed the Debtors $676.50 for 4.1 hours of legal work for "review[ing] legal research concerning discharging taxes in bankruptcy." *Fee Application*, Exhibit A. Without additional detailed information the scant description does not appear to justify the amount charged to the Debtors. In another entry dated January 9, 2007, Fitzgibbons billed three hours of time ($450) for "review[ing] procedures for confirmation hearing, prepar[ing] witness and exhibit list [and] review[ing] file." *Fee Application*, Exhibit B. These time entries are "lumped" and do not provide

the Trustee, creditors or the Court with sufficient information to determine the amount of time billed for each service.

The above are only two examples of the lack of detail and lumping that is pervasive throughout the time entries submitted with the Fee Application. Without additional details regarding the services provided, the Court cannot discern the nature and value of the services provided by Fitzgibbons. *Colorado-Ute*, 132 B.R. at 177. Simply put, Fitzgibbons has failed to meet his burden of demonstrating that many of the time entries in his Fee Application are reasonable. Where the Court cannot determine the reasonableness of certain time entries because of inadequate record keeping, the uncertainties must be resolved against the applicant. *Id.* The lack of information provides additional support for not allowing all requested fees.

3. Absence of Fee Disclosure Statement

The Trustee's final objection to the Fee Application raises the issues most troubling to the Court. She asserts Fitzgibbons did not timely file an attorney fee disclosure statement in this case, as is required by FED. R. BANKR. P. 2016(b) which states:

> (b) Disclosure of compensation paid or promised to attorney for debtor
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> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States

> trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Indeed, the Court's docket reflects no attorney fee disclosure was filed until December 14, 2007 (the "Fee Disclosure"), approximately fourteen months after the filing of the Debtors' case. The Fee Disclosure indicates Fitzgibbons received $2,250 and is dated "December 14, 2007 *nunc pro tunc* Sept 16, 2006." (italics added). The "*nunc pro tunc*" reference is presumably meant to indicate this was the amount received by Fitzgibbons approximately four days after the bankruptcy case was filed. However, the Court finds Fitzgibbons's failure to file the Fee Disclosure until approximately fourteen months after the case was filed to be a significant omission.

Several appellate courts have determined a bankruptcy court may deny any and all compensation in cases where counsel fails to satisfy the disclosure requirements under the Bankruptcy Code and Rules,

no matter whether the fees charged are considered to be excessive. *See, e.g.*, *In re Kisseberth*, 273 F.3d 714, 721-22 (6th Cir. 2001); *In re Lewis*, 113 F.3d 1040, 1045 (9th Cir. 1997); *In re Prudhomme*, 43 F.3d 1000, 1003 (5th Cir. 1995). Furthermore, "[u]nder abundant case law, noncompliance under Rule 2016(b), even if unintentional or inadvertent, will support the total denial of fees." *In re Vann*, 136 B.R. 863, 873 (D. Colo. 1992) (*citing In re Crimson Inv., N.V.*, 109 B.R. 397, 401 (D. Ariz. 1989); *In re Maui 14K, Ltd.*, 133 B.R. 657 (Bankr. D. Haw. 1991); *In re Kero-Sun, Inc.*, 58 B.R. 770 (Bankr. D. Conn. 1986)), *aff'd*, 986 F.2d 1431 (10th Cir. 1993) (unpublished case).

In this case, the Court understands Fitzgibbons to have received $2,250 at or around the time the Debtors' case was filed. This information was not provided until approximately fourteen months after the case was filed. However, at some other time during the case, unbeknownst to the Trustee, creditors, or the Court, the Debtors must have paid Fitzgibbons an additional $2,500, based on his Fee Application, which states Fitzgibbons had been paid $4,750 to date. This presents a host of questions, not the least of which is the question of how the Debtors obtained additional funds to pay Fitzgibbons while they were presumably committing all of their disposable income to their Chapter 13 plan. This illustrates the reason for the fee disclosure requirement under § 329 and FED. R. BANKR. P. 2016(b), to ensure the Court can carry out its obligation to scrutinize compensation of debtor's attorneys and thereby protect creditors. *See*

Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434, 456 (D. Utah 1998). Fitzgibbons's failure in this regard is more than sufficient to deny some or all of his requested fees in this case, especially considering the other objections raised by the Trustee.

C. A Reasonable Fee

Based on its review of the *Johnson* factors and the Trustee's Objection to the Fee Application, the Court finds the requested legal fees are not reasonable under the circumstances of this case. Therefore, the Court must next determine a reasonable fee based on the evidence presented.

At the evidentiary hearing, the Trustee was endorsed as an expert witness in Chapter 13 fee matters and indicated she believed a reasonable fee in this case would be approximately $4,600. In arriving at this number, the Trustee testified she used the presumptively reasonable fee now in effect as of January 1, 2007, of $3,000 and added ten billable hours at $165 per hour for certain issues regarding the Debtors' residency for tax lien purposes, as well as another issue dealing with the IRS's purported lien on the Debtors' retirement accounts, and arrived at the $4,600 amount.

It appears Fitzgibbons has previously received $4,750 from the Debtors as of the date of the hearing. Thus, the Trustee's $4,600 recommendation would require Fitzgibbons to disgorge $150.00, which the Court does not find appropriate in this case. Accordingly,

the Court will award Fitzgibbons the amount of $4,750 for his legal services in this case and $14.68 for expenses he has incurred in prosecuting this case, for a total fee in the amount of $4,764.68 of which $14.68 shall be paid through the Debtors' Chapter 13 plan. Accordingly, it is

ORDERED John Fitzgibbons, Esq., is awarded $4,750 for his legal services in this case.

IT IS FURTHER ORDERED $14.68 shall be paid through the Debtors' Chapter 13 plan for out-of-pocket expenses incurred in this case.

Dated March 26, 2008

BY THE COURT:

/s/ Michael E. Romero
Michael E. Romero
U.S. Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: WILLIS RAY MATNEY; PAMELA KAY MATNEY, Debtors.	
JOHN E. FITZGIBBONS, Appellant, v. SALLY J. ZEMAN, Trustee, Appellee.	No. 09-1170

ORDER

(Filed Mar. 12, 2010)

Before **GORSUCH** and **ANDERSON**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

These matters are before the court on two petitions for rehearing filed by the appellant – one seeking panel review, and one seeking en banc review. The petition for panel review is denied. The petition

for rehearing en banc is denied as untimely, and as such, will not be submitted to the en banc court.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

11 U.S.C. § 1328. Discharge

(a) Subject to subsection (d),[76] as ~~As~~ soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5) ~~of this title~~;

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (I)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) ~~of this title~~; ~~or~~

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

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[76] Section 1501(b)(2) CERTAIN LIMITATIONS APPLICABLE TO DEBTORS. – The amendments made by sections 308, 322, and 330 [adding the introductory clause to section 1328(a)] shall apply with respect to cases commenced under title 11, United States Code, on or after the date of the enactment of this Act.

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

(b) Subject to subsection (d),[77] at ~~At~~ any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if –

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured

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[77] Section 1501(b)(2) CERTAIN LIMITATIONS APPLICABLE TO DEBTORS. – The amendments made by sections 308, 322, and 330 [adding the introductory clause to section 1328(b)] shall apply with respect to cases commenced under title 11, United States Code, on or after the date of the enactment of this Act.

debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if –

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge –

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding

the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.

(h)[78] The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that –

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; ~~or~~

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[78] Section 1501(b)(2) CERTAIN LIMITATIONS APPLICABLE TO DEBTORS. – The amendments made by sections 308, 322, and 330 [adding section 1328(h)] shall apply with respect to cases commenced under title 11, United States Code, on or after the date of the enactment of this Act.

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that –

(A) such expenses are reasonable and necessary;

(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this

title; and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after ~~three years~~ the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(2~~3~~) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required –

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or (C)(i) for purposes of subparagraph (A) ~~of this paragraph.~~ –

(I) consumer debts owed to a single creditor and aggregating more than ~~$1,000~~[60] $500 for "luxury goods or services" incurred by an individual debtor on or within ~~60~~ 90 days before the order for relief under this title, ~~or~~ are presumed to be nondischargeable; and

(II) cash advances aggregating more than ~~$1,000~~[61] $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within ~~60~~ 70 days before the order for relief under this title, are presumed to be nondischargeable; and

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[60] ~~Under section 104, Adjustment of dollar amounts, currently $1,225.~~

[61] ~~Under section 104, Adjustment of dollar amounts, currently $1,225.~~

(ii) for purposes of this subparagraph

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably ~~acquired~~ necessary for the support or maintenance of the debtor or a dependent of the debtor; ~~an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act~~;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –

(A) if such debt is not of a kind specified in paragraph (2),(4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2),(4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

~~(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –~~

~~(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or~~

~~(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;~~

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty –

(A) relating to a tax of a kind not specified in paragraph

(1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for —

(A)(i) an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or

(ii) ~~for~~ an obligation to repay funds received as an educational benefit, scholarship or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual; ~~unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents~~;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful

because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit; ~~unless—~~

~~(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or~~

~~(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;~~

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the

debtor's interest in a ~~dwelling~~ unit that has condominium ownership~~, or~~ in a share of a cooperative ~~housing~~ corporation, ~~but only if such fee or assessment is payable for a period during which –~~

~~(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or~~

~~(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period~~; or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915~~(b) or (f)~~ of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

~~(18) owed under State law to a State or municipality that is –~~

~~(A) in the nature of support, and~~

~~(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.); or~~

(18) owed to a pension, profit-sharing, stock bonus, or other plan establishment under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under –

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that –

(A) is for –

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation

or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on or after the date on which the petition was filed,[52] from –

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not

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[52] Sec. 1404. (b) EFFECTIVE DATE UPON ENACTMENT OF SARBANES-OXLEY ACT – The amendment made by subsection (a) is effective beginning July 30, 2002.

include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be dis charged from a debt of a kind specified in paragraph (2), (4), or (6), ~~or (15)~~ of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6)~~, or (15)~~, as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver,

conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).